85-748

Case No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1985

George A. Keller,

Petitioner,

v.

The United States,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

Petition for Writ of Certiorari

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I. Questions Presented.

A. After a party has successfully litigated averments of jurisdictional fact, in order to obtain a transfer from one court to another, do principles of repose and finality preclude that party from later assailing the factual basis for the exercise of the jurisdiction of its chosen court.

B. Conflict between the Fifth and Federal Circuits on the question whether a public employee, after involuntary separation, forfeits his rights of administrative appeal and judicial review of that separation by accepting vested pension rights based on involuntary separation.

C. Do Fifth Amendment due process considerations allow presumption of waiver of rights to appeal and review of

involuntary separation from government service, where the record is silent and the employee was uninformed.

D. Do Fifth Amendment due process principles of fair play and substantial justice support the reasonable expectation of adherence to statute, regulation and precedent.

II. Parties to Proceedings Below.

In addition to the named Respondent, the following may have an interest in the outcome of this action, or were parties to earlier proceedings:

A. Merit Systems Protection Board

B. National Aeronautics and Space Administration

C. Marshall Space Flight Center

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V. Opinions Delivered Below.

This is an action for review of an administrative appeal arising out of the June 30, 1972 involuntary separation of Petitioner George A. Keller (Keller) from the service of the National Aeronautics and Space Administration (NASA) at Marshall Space Flight Center (MSFC) in Huntsville, Alabama, by reduction-in-force (RIF). In the thirteen years of this litigation, there have been numerous opinions entered, both administrative and judicial. Without some of the long case history, reference to these opinion out of context would be more confusing than illuminating.

Keller appealed his RIF to the Atlanta Regional Office of the Civil Service Commission (CSC) on July 14, 1972, raising five issues, including his

veteran's preference rights and his qualifications for the position to which he had declined to be reassigned (Appendix to Petition (hereinafter Pet. App.) pg. 169). Keller's appeal was summarily denied, with certain issues declared immaterial, on September 19, 1972 (Pet. App. pg. 164). Keller then appealed to the CSC's Board of Appeals and Review (BAR) on October 10, 1972. On March 8, 1973, the BAR summarily affirmed (Pet. App. pg. 160).

Keller then filed this action pro se in the United States District Court for the Northern District of Alabama, styled George A. Keller v. Robert E. Hampton, et al., Docket No. 75-G-0846-NE. On June 22, 1976, finding failure to respond to Keller's contentions, misconstruction and misapplication of law, arbitrary action and violation of Keller's rights of due

process, the District Court remanded to the CSC with instructions to respond fully to Keller's contentions (Pet. App. pg. 134). The CSC remanded to the Atlanta Field Office on August 5, 1976.

The Field Office affirmed the RIF action, without addressing the issue of whether Keller met the special qualifications for the reassignment, on May 12, 1977 (Pet. App. pg. 114). On May 27, 1977, Keller appealed to the ARB. The ARB issued an opinion on October 27. 1978 affirming in part and remanding to the Field Office for reconsideration of the issue of Keller's qualifications (Pet. App. pg. 104). On January 8, 1979, the Field Office affirmed the RIF (Pet. App. pg. 95).

Keller appealed to the Merit Systems Protection Board (MSPB) Office of Appeals. The District Court granted Keller's

motion to compel action by the MSPB, and on October 24, 1979, ordered the MSPB to enter a "final, reviewable decision" and to respond to all issues raised by Keller (Pet. App. pg. 93). On December 10, 1979 the MSPB rendered its final decision, which affirmed the RIF on the "sole issue" that Keller was qualified for reassignment to the position offered in the RIF (Pet. App. pg. 83).

Keller then moved in the District Court to review the MSPB decision. On April 29, 1980, the District Court issued its Memorandum Opinion in favor of Keller, finding the Board had failed to comply with due process, that its decision was arbitrary, capricious and unsupported by substantial evidence, and that the Board had blatantly ignored two Orders from the District Court. The

Court rendered its decision reinstating Keller with back pay.

On motion to reconsider by the defendant, that opinion was withdrawn and a second Memorandum Opinion was entered on June 26, 1981, which reached the same result on the merits, holding, inter alia, that Keller was not reasonably qualified for the position to which he had declined to be reassigned. George A. Keller v. Robert E. Hampton, et al., (N.D. Ala., Docket No. CA-75-G-0846-NE, June 26, 1981) (Pet. App. pg. 56).

On August 24, 1981, the government appealed to the Eleventh Circuit. It suggested that jurisdiction lay in the United States Court of Claims, because the award of back pay due Keller after 10 years had been calculated to exceed the sum of $10,000. On June 21, 1982, the Eleventh Circuit found that the facts

established jurisdiction in the Court of Claims, and ordered this action transferred. Keller v. Merit Systems Protection Board, 679 F.2d 220 (11th Cir. 1982) (Pet. App. pg. 44).

Keller resubmitted his original pro se Complaint before the Claims Court on October 20, 1982. On August 8, 1983, the United States served its Motion for Summary Judgment and brief. Keller filed a Cross-Motion for Summary Judgment and brief on September 16, 1983. On October 31, 1983, the United States filed its reply brief asserting for the first time that Keller had separated voluntarily by retirement, and that his acceptance of retirement benefits avoided the Court's jurisdiction.

Oral argument on the parties' Motions for Summary Judgment was heard before the Claims Court on September 5,

1984. The court on August 17, 1984 ordered Keller to address the issue of his retirement, in light of specific cases, in his argument (Pet. App. pg. 35). At the conclusion of the argument, the Court overruled plaintiff's Motion for Summary Judgment and entered judgment in favor of the United States on its Motion, dismissing plaintiff's Complaint, expressly without reaching or considering the merits of plaintiff's arguments. The decision, announced from the bench, held that the argument was jurisdictional, and that the United States was free to question the jurisdiction of the Court at any time. The Court concluded that Keller separated by RIF, but that he surrendered his right to appeal and review of his separation by accepting his vested annuity benefits (Pet. App. pg. 6).

Keller appealed from that decision to the United States Court of Appeals for the Federal Circuit, which issued an unpublished opinion on June 18, 1985, affirming the decision of the Claims Court. The Federal Circuit held that Keller's retirement precluded him from seeking reinstatement and back pay. Keller v. United States, affirmed, 770 F.2d 182 (Fed. Cir. 1985) (Pet. App. pg. 1). Keller petitioned for rehearing and suggested rehearing in banc, which were denied and declined without opinion by Order dated August 1, 1985 (Pet. App. pg. 168).

VI. Jurisdictional Statement.

The jurisdiction of this Court is invoked to review the decision of the United States Court of Appeals for the

Federal Circuit, entered June 18, 1985, with no time indicated; Petition for Rehearing and Suggestion of Rehearing In Banc were denied and declined on August 1, 1985; this Petition for Writ of Certiorari is brought under 28 U.S.C. Section 1254(1), within ninety (90) days of the entry of the Order denying rehearing, as provided under 28 U.S.C. Section 2101(c).

VII. Constitutional Provisions, Statutes and Regulations Involved.

This matter involves consideration of the following constitutional provisions, statutes and regulations. Those not recited herein are set forth in the Appendix:

U. S. CONST., amend. V.

5 U.S.C. §701 et seq..

5 U.S.C. §5596.

5 U.S.C. §7512 (1972 ed.).

5 U.S.C. §7701 (1972 ed.).

5 U.S.C. §7703.

5 U.S.C. §8336 (1972 ed.).

5 U.S.C. §8344(d):

(d) If a member receiving annuity from the Fund becomes employed in an appointive or elective position, annuity payments are discontinued during the employment and resumed in the same amount on termination of the employment, except that--

(1) the retired Member or Member separated with title to immediate or deferred annuity, who serves at any time after separation as a Member in an appointive position in which he is subject to this subchapter, is entitled, if he so elects, to have his Member annuity computed or recomputed as if the service had been performed before his separation as a Member and the annuity as so computed or recomputed is effective--

(A) the day Member annuity commences; or

(B) the day after the date of separation from the appointive position;

whichever is later;

(2) if the retired Member becomes employed after December 31, 1958, in an appointive position on an intermittent-service basis--

(A) his annuity continues during the employment and is not increased as a result of service performed during that employment;

(B) retirement deductions may not be withheld from his pay;

(C) an amount equal to the annuity allocable to the period of actual employment shall be deducted from his pay, except for lump-sum leave payment purposes under section 5551 of this title; and

(D) the amounts so deducted shall be deposited in the Treasury of the United States to the credit of the Fund;

(3) if the retired Member becomes employed after December 31, 1958, in an appointive position without pay on a full-time or substantially full-time basis, his annuity continues during the employment and is not increased as a result of service performed during the employment; and

(4) if the retired Member takes office as Member and gives notice as provided by section 8331(2) of this title, his service as Member during that period shall be credited in determining his right to and the amount of later annuity.

5 U.S.C. §8345(b):

(b) Except as otherwise provided, the annuity of an employee or Member commences on the day after he is separated from the service, or on the day after his pay ceases and he meets the service and the age or disability requirements for title to annuity. An annuity payable from the Fund allowed after September 5, 1960, commences on the

day after the occurrence of the event on which payment thereof is based.

5 U.S.C. §8345(d):

(d) An individual entitled to annuity from the Fund may decline to accept all or any part of the annuity by a waiver signed and filed with the Civil Service Commission. The waiver may be revoked in writing at any time. Payment of the annuity waived may not be made for the period during which the waiver was in effect.

28 U.S.C. §1491.

5 C.F.R. §550.805(e)(2):

(e) In computing the amount of back pay under section 5596 of title 5, United States Code, and this subpart, an agency shall deduct--

* * *

(2) Any erroneous payments received from the Government as a result of the unjustified or unwarranted personnel action, which, in the case of erroneous payments received from a Federal employee retirement system, shall be returned to the appropriate system. The agency shall include as other employment only employment engaged in by the employee to take the place of employment from which the employee has been separated by the unjustified or unwarranted personnel action.

VIII. Statement of the Case.

This case is a claim against the United States under 28 U.S.C. §1491, for judicial review under 5 U.S.C. §§701 et seq., 3502, 7512 (1972 ed.), 7701 (1972 ed.) and 7703, seeking reinstatement and benefits under the Back Pay Act, 5 U.S.C. §5596. Keller, a veteran's preference eligible, was employed by NASA at MSFC in Position 10448-S, and assigned effective September 17, 1968 to the Astronautics Laboratory. Keller was reassigned on Time Limited Assignment (TLA), to the Space Station Task Team April 14, 1969, approved January 22, 1970, and his position was revised to Position 11939.

Keller was returned to the Astronautics Laboratory on September 1, 1971, but his TLA was not terminated and he remained in Position 11939. Keller was advised that there was no room for

another position at his grade level, and that the Laboratory was faced with reductions-in-force. On May 15, 1972, Keller received a RIF notice, abolishing Position 11939, and offering reassignment effective June 30, 1972 to Position 11938 in lieu of separation, which he was given three days to accept or decline. If he declined or failed to reply, he would be separated by RIF effective June 29, 1972. MSFC advised Keller that reassignment could be accepted and subsequently declined. Keller accepted the reassignment on May 18, 1972, despite his concerns that his general engineering background left him unqualified for such a position, which involved specialized aerodynamic design and testing.

On June 27, 1972, at 3:50 p.m., Keller found on his desk a letter titled

"Assignment," dated June 26, 1972, from the Laboratory Director, Karl Heimberg. Independent of the formal position description, and effective June 30, 1972, Heimberg assigned Keller to work independently and report for a first review within two months on a highly technical project long underway without Keller's involvement, and to familiarize himself with a field of advanced astrophysics in which his predecessor had been regarded as a leader.

In light of Heimberg's letter, Keller concluded that he had accepted a job for which he was not qualified. Operating under a June 29, 1972 RIF deadline, Keller had two days to decline; as of June 30, 1972 he would be in Position 11938, and under Heimberg's assignments. Inadequate qualifications would risk Keller's separation for cause,

for inability to perform; from that his only recourse would be voluntary resignation.

Keller was 49 years of age, with 31 years of govenment service. If involuntarily separated by the planned RIF, Keller would be vested with an immediate discontinued service annuity, under 5 U.S.C. §8336(d) (1972 ed.). But if separated voluntarily (by resignation) or for cause, his annuity would not vest until age 55. The aerospace industry was then an especially poor job market for individuals over the age of 45. The immediate annuity offered the only certain prospect of financial support for Keller and his family.

On June 28, 1972, Keller orally advised MSFC that he would decline the reassignment. Later that day, he was advised that the June 29, 1972 deadline

for the RIF had been suspended by a temporary restraining order in a class action in the District of Columbia, and that he could not be separated prior to clarification of the order. On Friday, June 30, 1972, Keller received a copy of a letter which clarified the temporary restraining order.

Keller conferred with the agency to decline the reassignment, executed a form they provided as a prerequisite to the declination and separation, and was separated by RIF that day. Keller was never advised that his discontinued service annuity would affect his right to appeal the RIF. He submitted an application for his vested annuity on Monday, July 3, 1972. On June 14, 1972, Keller filed his appeal of his separation.

On administrative appeal, no question of jurisdiction was raised, nor any issue made of Keller's annuity. Therefore no findings of fact were made on these matters. Keller's assertion of involuntary separation was not responded to through six levels of administrative appeal, his first Complaint for judicial review in the District Court, on appeal to the Eleventh Circuit, nor even on resubmission of Keller's original Complaint in the Claims Court.

After counsel amended to restate Keller's original pro se Complaint in the Claims Court, the United States asserted lack of information to admit or deny his allegation of involuntary separation, which had been twice admitted in previous answers. Issue was not clearly made by the United States until its reply brief on summary judgment. The Claims Court's

decision was based on that belated averment. The Federal Circuit's affirmance predicates this Petition.

Certain key facts were overlooked by the Claims Court and the Federal Circuit. These facts distinguish Keller. First, Keller was a veteran's preference eligible. Second, he was separated from service by reduction-in-force (RIF) on June 30, 1972. He did not separate by retirement. Keller applied for his vested discontinued service annuity under 5 U.S.C. §8336(d) (1972 ed.), on July 3, 1972. Third, Keller's annuity--which the government approved--required prior involuntary separation, 5 U.S.C. §8336(d) (1972 ed.), and is distinct from "optional" or voluntary retirement, 5 U.S.C. §8336, (to which Keller was not entitled because of his age). There is no evidence to the contrary.

IX. Argument.

This matter presents for the Court's consideration a classic example of abuse of process through overextension of the theorem that subject matter jurisdiction can be questioned at any time. Here, that question was misapplied to deny Keller access to justice twelve years after the fact. The courts below allowed the government to reopen examination of the facts on which jurisdiction was based, despite repeated admissions of the jurisdictional facts, and one decision by a federal court of appeals on those facts. Certiorari in this matter should be granted to more clearly distinguish the divergent principles, that subject matter jurisdiction may remain open as a question of law, but that finality should

be given to admitted or litigated jurisdictional facts.

After admitting Keller's allegations of jurisdiction based on involuntary separation, during both administrative appeal and judicial review, the United States lost on the merits of the case in the District Court. Only then, ten years after Keller's separation, did the United States assert that the amount of Keller's claim exceeded $10,000, a jurisdictional fact which the government advanced and litigated on appeal to the Eleventh Circuit. Having admitted and even litigated jurisdictional facts, and having successfully argued in favor of the Claims Court's jurisdiction, Keller v. Merit Systems Protection Board, supra, the United States advanced an attack on the Claims Court's jurisdiction in its reply brief on summary judgment.

This second assault on the court's jurisdiction to hear Keller's case was predicated on new, factual averments: that Keller had either voluntarily separated or waived his right to appeal his separation. The Claims Court's decision to entertain and then adopt this argument, affirmed by the Federal Circuit, conflicts with decisions in this Court and other circuits holding that parties should be bound to jurisdictional facts, once either admitted or litigated. Pittsburg, C. & St. L. Ry. v. Ramsey, 89 U.S. (22 Wall.) 322 (1875); United States v. Riles, 70 F.2d 880 (8th Cir. 1934); United States v. Ellison, 74 F.2d 846 (4th Cir. 1935); Vincent v. United States, 76 F.2d 428 (D.C. Cir. 1935); United States v. Wilson, 78 F.2d 465 (10th Cir. 1935); Murphy v. Sun Oil Co., 86 F.2d 895 (5th Cir. 1936), certiorari

denied, 300 U.S. 683 (1937); Young v. Handwork, 179 F.2d 70 (7th Cir. 1949), certiorari denied, 339 U.S. 949 (1950); N.L.R.B. v. Townsend, 185 F.2d 378 (9th Cir. 1950).

To give finality to determinations of such facts is a rule of fairness, applied to prevent litigants from taking inconsistent positions regarding the factual basis for jurisdiction, Roth v. McAllister Brothers, Inc., 316 F.2d 143 (2d Cir. 1963), or from a tardy challenge to the jurisdiction of a forum it has chosen. City of Brady, Texas v. Finklea, 400 F.2d 352 (5th Cir. 1968). The United States has once prevailed on appeal on its argument that the facts herein gave the Claims Court jurisdiction over this matter. Keller v. Merit Systems Protection Board, supra. For the United States to raise factual questions to

invalidate that jurisdiction now cannot be tolerated: "a defendant may not play fast and loose with the judicial machinery and deceive the courts." DiFrischia v. New York Central Railroad Co., 279 F.2d 141, 144 (3d Cir. 1960).

Perhaps the Claims Court and Federal Circuit were simply too overzealous in their adherence to the generally accepted principle that subject matter jurisdiction can always be questioned. They failed to discern that the alleged absence of jurisdiction did not appear "affirmatively from the record." Cf., Mansfield, C & L.M. Ry. v. Swan, 111 U.S. 379, 386 (1884). The attack on jurisdiction hinged on questions of fact which had once been litigated and were foreclosed, by the law of the case, cf., Skillern v. May, 10 U.S. (6 Cranch) 267 (1810), if not collateral estoppel or res

judicata. Cf., Chicot County Drainage Dis. v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed.2d 329 (1940); Durfee v. Duke, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963).

Moreover, the Merit Systems Protection Board's decision to consider Keller's appeal, and not dismiss it for lack of jurisdiction, should have been given weight. Federal Power Commission v. Louisiana Power & Light Co., 406 U.S. 621, 92 S.Ct. 1827, 32 L.Ed.2d 369 (1972). The administrative tribunal's implicit determination of the facts giving it jurisdiction over Keller's administrative appeal should have been binding on judicial review. Manning v. Merit Systems Protection Board, 742 F.2d 1424 (Fed. Cir. 1984).

Certainly, if these were issues of fact not previously decided by the MSPB,

the United States should have been barred by the doctrine of res judicata and collateral estoppel from raising new issues on judicial review. Spears v. Merit Systems Protection Board, 766 F.2d 520 (Fed. Cir. 1985). Judicial review should be confined to the administrative record. Roberts v. Morton, 549 F.2d 158 (10th Cir. 1976), certiorari denied, 434 U.S. 834, 98 S.Ct. 121, 54 L.Ed.2d 95.

Because it is generally considered to remain "open season" on subject matter jurisdiction, some enlightened guidance from this Court, as by Writ of Certiorari here, is needed. Blind exercise of jurisdictional scrutiny, especially in cases of severe prejudice to one litigant, ought to be mitigated. See, Dobbs, Beyond Bootstrap, 51 MINN. L.REV. 491 (1967); 18 Wright & Miller, FEDERAL PRACTICE & PROCEDURE §4428.

The prejudice to Keller, facing a novel averment of twelve-year old facts, is unmistakable. He had been in litigation for years; witnesses had died in the interim. At the very least, the United States has overreached this individual citizen, if it has not exploited the judicial system and wasted its resources. Intervention in this case can clarify the distinction between the principles of determining subject matter jurisdiction and seeking prompt and final adjudication of the facts. Certiorari here may serve both to conserve judicial economies and to advance the notion of fair play and substantial justice.

The United States' novel assertion had to be couched as a jurisdictional argument. Arguably, twelve years' delay may be excused on matters of subject matter jurisdiction. Estoppel could

clearly bar an averment phrased otherwise. Cf., Russell Corp. v. United States, 537 F.2d 474, 210 Ct. Cl. 596 (1976), certiorari denied 429 U.S. 1073, 97 S.Ct. 811, 50 L.Ed.2d 791 [against denial of fact of contract]; Bolton v. Giuffrida, 569 F.Supp. 30 (N.D. Cal. 1983) [where detrimental reliance and threat of serious injustice].

The Claims Court allowed the United States' argument to be raised so late on the assumption it was jurisdictional. Yet the decision to dismiss on that defense does not turn on subject matter jurisdiction at all. The Claims Court found that Keller's separation occurred before he took his annuity, but concluded that Keller, by "applying for and accepting retirement, voluntarily surrendered all claims to his former position." (Pet. App. pg. 32.)

Once Keller was separated by the RIF, jurisdiction vested. He had suffered an adverse action, which violated his veteran's preference rights. By virtue of the RIF action, Keller was entitled by statute to administrative appeal and judicial review. 5 U.S.C. §§701 et seq., 3502, 7512 (1972 ed.), 7701 (1972 ed.) and 7703. He could be made whole, under the Back Pay Act. 5 U.S.C. §5596. Nothing in the statutes indicates that jurisdiction, once vested, can be divested.

Keller took his annuity after separation by RIF; under the same facts, jurisdiction has been found to lie with the MSPB. Kestner v. United States, 229 Ct. Cl. 772, 774 (1982); Gonzales v. Dept. of Transportation, 701 F.2d 36, 39 (5th Cir. 1983). The subsequent annuity should not divest him of his rights, nor

the courts of their jurisdiction to review the administrative appeal of such adverse action. Dean Forwarding Co., Inc. v. United States, 2 Cl. Ct. 559 (1983). Jurisdiction to review Keller's appeal in court was established by the exercise of jurisdic ion by the MSPB to hear the appeal in the first instance. Manning v. Merit Systems Protection Board, supra.

Supreme Court intervention is sought in this action to resolve a conflict between the decisions of the Federal Circuit and those of the Fifth Circuit. The Federal Circuit has held that one who accepted involuntary separation, then took a discontinued service retirement annuity, as did Keller, has "voluntarily surrendered" his right to appeal. The Fifth Circuit has stated that such an employee would not lose his right to

appeal. Gonzales v. Dept. of Transportation, supra. The conflicting result would allow separated federal employees to be treated in opposite fashion, depending on whose claim exceeded the sum of $10,000 and had to be pursued in the Federal Circuit. Surely such a monetary distinction presents no rational basis for disparate treatment under the law.

Furthermore, the result embraced by the Federal Circuit, and eschewed by the Fifth Circuit, effects an absolute travesty of justice. Having lost his employment, Keller was at his peril to provide for his family. The Federal Circuit would deny Keller the support of the annuity accumulated during his 31 years of service, while he pursued this appeal, which has now been pending for over 13 years. The government would

always prevail in such a simple war of attrition, regardless of the merits. The Federal Circuit would see the wrongfully discharged public employee forced out of court because economic necessity forced him to rely upon a vested property right. The same defense has been rejected by the Fifth Circuit in private employment cases. Cf., Hays v. Republic Steel Corp., 12 F.E.P. Cases 1640 (N.D. Ala. 1974), 531 F.2d 1307, 12 F.E.P. Cases 1654 (5th Cir. 1976). Such an irrational conflict in results suggests the need for the Court's intervention.

The gravity of the lower courts' mistakes far exceeds mere error or conflict between circuits. More importantly, the court's decision here presumed a waiver of rights accorded Fifth Amendment due process protection, in the face of case law long established

by this Court. The practical effect of the Claims Court's decision and the Federal Circuit's affirmance is that Keller could not enjoy both his appeal and review and his annuity, that by taking his annuity Keller surrendered his right of action. This unfairly places the federal employee in a dilemma, repugnant to the principles of due process which protect tenured federal employees, Colm v. Vance, 567 F.2d 1125 (D.C. Cir. 1977).

Concomitant with his job, Keller had a property interest in his employment. Kizas v. Webster, 707 F.2d 524, 227 U.S. App. D.C. 327 (D.C. Cir. 1983), certiorari denied, 104 S.Ct. 709. He enjoyed additional, constitutionally protected rights as a veteran's preference eligible. Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972).

On the other hand, Keller's annuity was a vested property right, as well. By statute, his annuity commenced automatically on the day after his separation, under 5 U.S.C. §8345(b), regardless of his application.

The courts below concluded that Keller waived his right of appeal and review when he accepted his annuity. But to have declined that annuity, unbeknownst to Keller, the law would have required him to file a written waiver with the CSC, now the Office of Personnel Management. 5 U.S.C. §8345(d).

The lower courts indicate that Keller waived his veteran's preference rights to appeal and review of his separation. Yet in what appears to be binding precedent, the Claims Court has rejected that notion. There could be no waiver, as no provision for such a waiver

of rights was found in the Veteran's Preference Act. Cunningham v. United States, 423 F.2d 1379 (Ct. Cl. 1970).

In no way does the evidence in the record support the courts' conclusion of a waiver by Keller's failure to decline his annuity. For there to be a waiver, "it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege," which demands an examination of the facts allegedly supporting the waiver. Brookhart v. Janis, 384 U.S. 1, 4, 86 S.Ct. 1245, 1247, 16 L.Ed. 2d 314 (1966). To pass constitutional muster, waivers "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742,

748, 90 S.Ct. 1463, 1469, 25 L.Ed. 2d 747 (1970).

There was no advice given Keller regarding the effect of taking his vested annuity or suggesting the need to file a written waiver of his annuity rights to preserve his appeal rights. It can only be concluded that the courts presumed a waiver of Keller's rights from a silent record, which is a denial of due process. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969).

There is even a presumption against finding waiver: "we are unwilling to find waiver in circumstances which fall short of being clear and compelling." Curtis Publishing Company v. Butts, 388 U.S. 130, 145, 87 S.Ct. 1975, 1986 (1967). It is this high concept of due process that makes the Orders below so especially

odious to call for intervention by this Court on Writ of Certiorari.

Action by this Court, furthermore, is the only method for correction of these courts' gross departure from accepted judicial standards. These decisions trammel upon not only the Constitution, but also statutes, Congressional intent, and pertinent regulations. Because they are unreported, and conflict with reported decisions, their use as precedent denies even the most diligent litigant the reasonable expectation of stare decisis. These unreported decisions, until reversed by this Court, may otherwise be invoked against any federal claimant. They must be overturned to avoid judicial chaos.

The conclusion that Keller's annuity adversely affected his administrative and

judicial remedies is unsupported. By statute, his annuity would end on reinstatement, 5 U.S.C. §8344. The intent of Congress to aid, not penalize, people in Keller's situation was clearly stated:

> * * * to provide that when an annuitant whose prior separation was based on involuntary causes (reduction-in-force, etc.) was reemployed, he surrendered his retirement status and became a regular contributing member of the retirement program just as if he had never been retired. It is felt that this benefited the involuntarily separated employee whose career had been interrupted through no fault of his own.

S. Rep. No. 1069, 89th Cong., 2d Session, reprinted in 1966 U.S. Code Cong. & Ad. News 2090, 2091. At least since 1956, Congress has intended that annuitants not be barred from reemployment. Federal Executive Pay Act of 1956, Ch. 804--Public Law 854, 84th Cong.--2d

Session, reprinted in 1956 U.S. Code Cong. & Ad. News 858, 883 and 3725, 3736.

Nothing in the Back Pay Act, 5 U.S.C. §5596, says that its remedies are exclusive of the right to an annuity. As Congress has stated, the purpose of the Act is to make whole, not work a forfeiture:

> It puts the employee in the same position he would have been and had the unjustified or erroneous personnel action not taken place * * * an employee is entitled to be made whole whenever an erroneous personnel action which has terminated . . . his compensation is corrected by appropriate authority (emphasis added).

S. Rep. No. 1062, 89th Cong., 1st Session, reprinted in 1966 U.S. Code Cong. & Ad. News 2097.

Moreover, the regulations promulgated for the agency administration of the Act provide that annuity payments are simply to be offset against the back

pay award. 5 C.F.R. §550.805(e)(2). It is only a prerequisite to a Back Pay Act claim that the employee be willing and able to perform. Walker v. United States, 179 Ct. Cl. 723 (1967), certiorari denied, 389 U.S. 1036, 88 S.Ct. 772, 19 L.Ed. 2d 825. Keller remains ready, willing and able to perform a job properly offered, for which his qualifications are reasonably adequate.

The Federal Circuit affirmed the decision of the Claims Court, that Keller surrendered his cause of action by taking his annuity, in an unreported opinion (Pet. App. pg. 1), based on its prior unreported decision (Pet. App. pg. 41) affirming Brown v. United States, 2 Cl. Ct. Rep. 586 (1983), affirmed, 732 F.2d 167 (Fed. Cir. 1984). While Brown can be factually distinguished and was

erroneously applied, such unreported decisions lay a trap for the litigant who relies on stare decisis effect of conflicting, reported decisions on the same issues.

The courts below did not respond to Keller's argument that he was too inadequately counselled to be deemed to have waived his rights. While focusing on questions of actual deception, the lower courts' decisions avoided consideration of the requirements in the law that reasonable advice be given to the employee. For example, in Taylor v. United States, 591 F.2d 688 (Ct. Cl. 1979), regulations were recognized as providing that an action is voluntary only if the employee "has freedom of choice" and "understands the transaction," Id. at 691.

Yet these guidelines were ignored in the lower courts, in spite of the total absence of advice given Keller on the effect of his retirement, as shown by the record on appeal. Keller could not have understood the transaction at issue; not understanding, he had no freedom of choice. By prior, reported case law, neither distinguished nor overturned, Keller's actions would therefore not qualify as "voluntary."

The Federal Circuit's affirmance of the Claims Court's "voluntary surrender" holding is especially anomalous in light of precedent. Keller did not need to prove intent to deceive, but only that a reasonable person under the circumstances would have been misled. Scharf v. Dept. of the Air Force, 710 F.2d 1572 (Fed. Cir. 1982).

The record reflects no advice to Keller that accepting his annuity would preclude any right to a later appeal and review of his separation. The same failure to advise had been deemed a denial of the right to consider such fact in making the decision to accept the annuity. Covington v. Dept. of Health & Human Services, 750 F.2d 937, 943 (Fed. Cir. 1984). Keller's decision, "based on misinformation or a lack of information, cannot be binding as a matter of fundamental fairness and due process." Id.

The Federal Circuit has publicly rejected such a choice as Keller's as "a Hobson's choice, that is to say no real choice at all," Id.. Yet it proceeds to dismiss employees' actions, in unreported decisions such as Keller's and Brown v. United States, supra, for lack of

affirmative evidence that the employee was "misled as to the effect retirement would have on his rights." Keller v. United States, at 2 (Fed. Cir. App. No. 85-729, June 18, 1985) (Pet. App. pg. 3).

This disparate result on the same facts is exactly the sort of departure from the accepted principles of stare decisis and the usual course of judicial proceedings that requires this Court's intervention. Rule 17.1(a), Supreme Court Rules. The role of law in our society is to govern our conduct. Without the Court's guidance here, that certain conduct which is subject to the jurisdiction of the Claims Court and the Federal Circuit will have lost some of the law's governance. Litigants will apparently be unable to rely on reported case precedent in these courts.

The failure of the courts below to adhere to their own precedents even extends to the scope of inquiry given Keller's case. It had repeatedly been held in recent, similar cases that to fully and fairly determine voluntariness in this context, the court must consider the merits of the case. Burgess v. Merit Systems Protection Board, 758 F.2d 641 (Fed. Cir. 1985); Hearne v. United States, 7 Ct. Cl. 362 (1985); Covington v. Dept. Health & Human Services, supra. The reason for such holdings was obvious: if, but for the wrongdoing of the agency, the employee would not have been in this dilemma, would not have had to choose between alternative actions, then his choice must be involuntary and not binding. Roskos v. United States, 549 F.2d 1386 (Ct. Cl. 1977). Yet in determining that Keller had "voluntarily

surrendered" his right of action, the Claims Court specifically stated that it did not consider the merits of his case. (Pet. App. pg. 33). The affirmance of that decision by the Federal Circuit after the rulings in Roskos v. United States, Burgess v. Merit Systems Protection Board, Hearne v. United States, and Covington v. Dept. Health & Human Services, supra, is so abusive of Keller's reasonable expectations of substantial justice and due process as to cry out for the issuance of this Court's Writ.

Although they went so far as to consider facts outside the record and once-litigated facts, the Claims Court and Federal Circuit failed to discern the facts that distinguish this case. Keller was clearly separated by RIF. His subsequent "discontinued service

retirement" annuity was officially approved by the agency, under 5 U.S.C. §8336(d) (1972 ed.). The statute expressly conditions entitlement to the annuity on involuntary separation. Keller's age, 49 years, disqualified him for receipt of "optional" retirement on voluntary separation. 5 U.S.C. §8336.

The approval of Keller's annuity represents an official determination that he was involuntarily separated, a determination entitled to the presumption of regularity which clothes official acts. Wilmot v. United States, 205 Ct. Cl. 666 (1974). Keller was entitled to rely on the presumption of regularity, yet the courts below held that Keller failed to prove his separation was involuntary. Not one case was cited to hold that Keller's §8336(d) annuity would be presumed to be voluntary. The government

should have had the burden of disproving the correctness of the agency determination. Due process argues that, under these facts, it was impermissable to place on Keller the burden of proving the correctness of the official determination given his separation.

Furthermore, to find this a voluntary separation is to deprive the statutory language of its express meaning. To achieve that goal, the statute must be bent, and its words strained against the intent of Congress, which must be avoided. Ocean Drilling & Exploration Co. v. United States, 600 F.2d 1343 (Ct. Cl. 1979). The absurdity of this construction of the statute, and the equally absurd result, must be disdained. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982).

The government never denied Keller's eligibility for his discontinued service retirement annuity. There is no basis for its inconsistent assertion that Keller was not separated by RIF, or that his "retirement" was anything but involuntary. On identical facts, the Federal Circuit has held the employee's retirement involuntary. Covington v. Dept. Health & Human Services, supra at 942. The failure of the court to adhere to its own precedent, without any distinction drawn, brings disarray to our judicial system. Order can be restored by the issuance of the Court's Writ.

Keller has been overreached by the government's factual sleight-of-hand, assisted by the lower courts' departure from reasonable standards of jurisprudence. If the District Court's opinion is any indication, Keller should

prevail on the merits of his challenge to the separation from service. Like any other litigant, Keller had the right to a prompt, full and fair determination of his case on its merits. Without this Court's assistance, that will have been denied him. With the Court's guidance, it will be less likely to be denied others in the future.

Respectfully submitted,

James H. Richardson
Counsel of Record for
Petitioner

X. Appendix.

Due to the voluminous nature of the materials appended to this Petition, Petitioner separately presents his appendix.

XI. Certificate of Service and Filing.

I, James H. Richardson of Huntsville, Alabama, a member of the Bar of this Court, do hereby certify, under penalty of perjury, that on this 30th day of October, 1985, I caused to be placed in the United States Mail (first-class postage prepaid) Petitioner's "PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT" and "PETITIONER'S APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT" as follows:

A. Three copies of both documents were addressed to each of the following:

1. Solicitor General
   United States Department
   of Justice
   Washington, D.C. 20530

2. Kathleen A. Flynn, Attorney
   Commercial Litigation Branch

Civil Division
Department of Justice
Washington, D.C. 20530

B. Forty copies of both documents were addressed as follows, for filing within the permitted time under Rule 28, Supreme Court Rules:

1. Honorable Joseph Spaniol, Clerk
The Supreme Court of the
United States
1 First Street, N.E.
Washington, D.C. 20543

James H. Richardson

James H. Richardson

STATE OF ALABAMA

COUNTY OF MADISON

The foregoing Certificate of Service and Filing was sworn to and subscribed before me this 30th day of October, 1985.

Susan M. Campbell
Notary Public
My commission expires:
9-20-87

85-748

Case No. _____

Supreme Court, U.S.
FILED
OCT 30
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1985

George A. Keller,

Petitioner,

v.

The United States,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

Appendix to Petition for Writ of Certiorari

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Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

GEORGE A. KELLER, Appellant,	)	
v.	)	Appeal No. 85-729
THE UNITED STATES, Appellee.	)	

DECIDED: June 18, 1985

Before BENNETT, Circuit Judge, MILLER, */ Senior Circuit Judge, and SMITH, Circuit Judge.

PER CURIAM.

DECISION

---

*/ The Honorable Jack R. Miller assumed senior status, effective June 6, 1985.

The judgment of the United States Claims Court, on September 5, 1984, denying appellant's motion for summary judgment and granting appellee's motion for summary judgment, is affirmed.

OPINION

The appellant charged in his complaint that his dismissal from the National Aeronautics and Space Administration was due to an unjustified personnel action, and he made a claim for back pay and reinstatement. The Tucker Act, 28 U.S.C. § 1491 (1982), confers jurisdiction on the Claims Court to decide suits brought under the Back Pay Act, 5 U.S.C. § 5596 (1982), and also gives the court authority to order reinstatement as part of any relief granted.

The Claims Court determined that, because appellant voluntarily retired and received retirement benefits, there was no right of action under the Back Pay Act and

therefore no jurisdiction conferred on the court by the Tucker Act. The court based its decision directly on Brown v. United States, 2 Cl. Ct. 586 (1983), aff'd, 732 F.2d 167 (Fed. Cir. 1984), which held that "where an employee has accepted retirement he is precluded from seeking reinstatement and back pay." Id. at 587. See also Kestner v. Department of the Interior, 229 Ct. Cl. 772 (1982). Appellant's situation cannot be sufficiently distinguished to accomplish a different result. We are bound by the precedent in Brown.

Appellant contends that his retirement was involuntary, and therefore Brown is inapplicable. There is, however, absolutely no evidence that appellant was coerced into retirement or misled as to the effect retirement would have on his rights. The mere fact that none of appellant's options were to his liking is irrelevant. Taylor v.

United States, 591 F.2d 688, 690-91 (Ct. Cl. 1979).

All other issues are subsumed by appellant's act of voluntary retirement which deprived the Claims Court of jurisdiction.

IN THE UNITED STATES CLAIMS COURT

No. 482-82C

(Filed: September 5, 1984)

GEORGE A. KELLER)
)
v.)
)
THE UNITED STATES)

ORDER

For the reasons stated in the transcript of proceedings this day held, defendant's motion for summary judgment is granted, plaintiff's motion for summary judgment is denied, and the complaint will be dismissed.

IT IS SO ORDERED.

/s/ Harry E. Wood
Harry E. Wood
Judge

OFFICIAL TRANSCRIPT

Before the

UNITED STATES CLAIMS COURT

Case No. 482-82c

In the Matter of:

GEORGE A. KELLER,
Plaintiff,

vs

THE UNITED STATES,
Defendant.

Place: Washington, D. C.

Pages 1 - 79

Date: Wednesday, September 5, 1984

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IN THE UNITED STATES CLAIMS COURT

In the Matter of:	
GEORGE A. KELLER, Plaintiff,	Case No. 482-82C
-vs-	
THE UNITED STATES, Defendant.	Oral Argument

Courtroom No. 8, Room 512
United States Claims Court
717 Madison Place, N. W.,
Washington, D. C.

Wednesday, September 5, 1984

The parties met, pursuant to Notice of the Judge, at 10:00 a.m.,

BEFORE: HONORABLE HARRY E. WOOD,
Judge

APPEARANCES:

For the Plaintiff

JAMES H. RICHARDSON, ESQUIRE
Bell, Richardson, Herrington,
Sparkman & Shepard, P. A.,
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Huntsville, Alabama 35804-2008

For the Defendant:

EILEEN P. FENNESSY, ESQUIRE
Department of Justice,
Washington, D. C.

MR. RICHARDSON: Yes, sir. I would point out that the Perlman Decision is one of the older decisions on this point and it was a 1974 decision, which was prior to the answer originally filed by the Defendant in District Court.

I would question, and I must apologize to Your Honor -- I don't know the proper perspective that this should be placed in -- I question whether the Defendant can be estopped to raise this question at this point, in a procedure, after the Administrative Appeal has taken place, and I question whether it is appropriate matter to raise in a reply brief and not an original brief.

If appropriate, I think the Plaintiff should move to strike his argument, but I do not know that that is appropriate.

THE COURT: I don't either. What the Government is saying is that the Plaintiff

has failed to state a claim over which relief can be granted, which is a jurisdictional defense, as I understand it. And as I further understand the rules of this Court, the jurisdictional defense can be raised at any time.

What the Court of Appeals said in Mr. Keller's case in another context is certainly relevant here, but I don't know that I can estop the Government from suggesting lack of jurisdiction to grant relief. And I don't think it is estopped to raise the argument.

MR. RICHARDSON: Yes, sir, I would further question whether the Government can present this question in this forum when it did not present the question in the Agency forum. I think that is what one of the key distinguishing factors between Mr. Keller's situation and the other cases cited.

THE COURT: Mr. Richardson, in the Brown Case, which I specifically invited the attention of Counsel to, the Civil Service Commission explicitly made a determination that Mr. Brown's separation was involuntary. That separation, followed by a retirement application, was held by Judge Kozinsky to preclude any right to question the propriety of his separation. And that decision was affirmed on appeal by the Court of Appeals for the Federal Circuit.

I am troubled -- I might add that in the Brown Case, the matter was injected into

the case by the Chief Judge at oral argument, and required the filing of a supplemental brief by Defendant, following the oral argument.

MR. RICHARDSON: Sir, I apologize if I was lackadaisical in my approach. I was not privy to the file in that matter, and confess I did not try to make myself familiar with the file, itself. It did not appear, on my study of the case, that the finding had been made.

THE COURT: If you would like a recess, I would be happy to take a recess and let you have 15 or 30 minutes to take a look at the files in Brown, because I am concerned about this.

The rule of Brown is, as the Chief Judge said, a harsh one. My question is not necessarily whether it is harsh or not, but whether it applies here to your client. I

am concerned for reasons which I think I have made clear.

MR. RICHARDSON: Your Honor, I would prefer to proceed with argument now, and perhaps we could recess at the conclusion of the argument and I could review the Brown file and submit it for brief, or renew our argument at a later time.

THE COURT: I will allow you to go ahead.

MR. RICHARDSON: Your Honor, as I am sure you are aware, that in the Brown Case, the Plaintiff had filed his resignation prior to the effective date of the separation and that this would be in the nature of -- I believe it was the language in the RUDD which called the involuntary separation determination by the Agency a legal fix to allow the Plaintiff to allow to separate with his annuity and to allow the Defendant to rid themselves of the Plaintiff.

I think that the time sequence which we attempted to elaborate upon with Mr. Keller's affidavits are essential here. The cases that the Defendant had cited and which seemed to be adopted in this line of decision with Brown and Kessner.

THE COURT: Doesn't Brown hold just the opposite?

MR. RICHARDSON: Your Honor, I don't think so. I think Brown can be and should be distinguished.

THE COURT: Tell me why. I will allow you to do that. I have read Brown. The facts in Brown are as I have indicated them to you. Mr. Brown was ordered to move from one location to another. He declined.

Charges were preferred against him. He decided to make an application for separation. He was permitted to do so, I think for failure to transfer. He was separated. His separation was determined to be involun-

tary, whether fictionally or otherwise. It was an involuntary separation.

He then applied for an annuity and he got it. Judge Kozinski held that there was no indication in the record of coercion or deception and that the application for involuntary retirement annuity was enough to cut off his right to question the validity of his separation and the Court of Appeals affirmed that decision.

Now there are factual differences. This was a separation in connection with a reduction-in-force, not a separation for cause. In this instance, I don't know whether the separation or the application for retirement annuity in fact took place first, but they were about the same time in the Brown case, I think. The request for separation and the application for retirement annuity were not simultaneous.

But, in any event, I am not sure I see any real difference.

MR. RICHARDSON: Your Honor, in the Brown Case the Plaintiff did apply for his retirement benefits prior to the effective date of the separation.

THE COURT: And in this case, Mr. Keller did not apply much prior to his separation, if any.

MR. RICHARDSON: In fact, Your Honor, according to the affidavit of Mr. Keller and the documents exhibited therewith, Mr. Keller received his retirement application on the 30th, prepared it at home that night, signed it that night, assembled the documents under one of the sub-sections regarding military service history and filed the documents with the Agency on July 3rd, which was the following Monday.

THE COURT: Even accepting what you

tell me is true, what difference does it make?

MR. RICHARDSON: Your Honor, I think you have to look at -- I think you can distinguish cases such as Brown on the very fact that prior to the effective date of the separation the litigant chose to take a retirement benefit.

Now, I don't think in any other cases, whether it has been held voluntary or involuntary, anyone simply held a gun at the head of the annuitant. In every case, it is a volitional act to make this application and it goes back to the circumstances. Qualifications, which would be sufficient for separation for cause, inability to perform the tasks assigned.

THE COURT: That is apparent from the Administrative Record.

MR. RICHARDSON: I think obviously it was a volitional act by Mr. Keller, but he

was under the gun, so to speak. Mr. Taylor's case, deciding that the Plaintiff could have left his annuity in abeyance pending appeal. I would submit, Your Honor, that it has been over 12 years since this matter was initiated, Mr. Keller's annuity would have been forfeited for 12 years, which I think is too penal a result to be followed.

THE COURT: Let me put it this way: I have no disagreement with the proposition that if the rule of Brown applies to the fact of this case, the result is indeed harsh. The question is, (a), if Brown applied, and (b), if it does, can I overrule the Court of Appeals.

MR. RICHARDSON: Again, Your Honor, I think it does not apply and you can cite Perlman, which has not been overturned. Again, I would submit that the time factors

involved are as pressing to Mr. Keller as they were to Mr. Perlman.

Shall I continue with the merits, Your Honor?

THE COURT: Yes.

MR. RICHARDSON: Your Honor, in my reply brief,

Mr. Keller to Pogo effect.

THE COURT: He was told that he would get the help of the an ytical team, wasn't he?

MR. RICHARDSON: That is correct, but I believe that refers to the HEAO Program in which --

THE COURT: Why do you think that?

MR. RICHARDSON: Because there was a structural analysis referral. There are repeated references to analysis.

THE COURT: Speaking of the HEAO Project, Mr. Heimburg says, "Secondly, I want you to become familiar with the work on

Pogo," and in the next paragraph he says that he has informed the analytical mechanics division chief, "of this assignment" to you. What makes you think that means HEAO rather than Pogo?

MR. RICHARDSON: The absence of any reference to structural analysis in the Pogo assignment. Furthermore, Your Honor, I believe you asked about, wouldn't he have the back-up of the analytical mechanics division. That paragraph, the top of 374, goes on to inform Mr. Keller that he would be primarily responsible.

THE COURT: I am aware of that. Do you have anything further at this stage, Mr. Richardson?

MR. RICHARDSON: No, Your Honor.

THE COURT: I am going to stand in recess until 1:30 p.m., during which time I will make available to you the governmental supplemental brief in the Raymond Brown Case

-- my copy of it -- and Mr. Brown's reply. When we get back, I am going to give you ten minutes, and no more than that -- maybe not quite that -- in which to distinguish, if you can, Brown from this case.

Following that, I will allow the Government rebuttal.

Court will stand in recess.

(Whereupon, at 12:00 Noon, the hearing was adjourned, to reconvene at 1:30 p.m., the same day.)

AFTERNOON SESSION - 1:30 p.m.

THE COURT: Good afternoon. Court will come to order. Mr. Richardson, I would be interested in any comments related to Brown versus United States that you would care to offer.

MR. RICHARDSON: Your Honor, I have replaced the briefs on the Bench, and apologize, but the findings of the Civil Service were not addressed in either of the reported or non-reported decisions.

THE COURT: That is correct, and that is why I went back into the record to see if I could find out what underlay the decision and if it truly was distinguishable.

MR. RICHARDSON: Yes, sir. It occurs to me on a review of the Brown Case that there are certain factors involved that are not involved in Mr. Keller's case.

One, a distinction has been made in the line of cases on voluntary or involuntary resignations or retirements regarding the use of the Department of Agriculture Personnel Regulations as opposed to the Federal Personnel Manual, in that the Department of Agriculture states explicitly that a resignation in the face of such an action is involuntary separation for retirement purposes. To that extent, it is a mandatory finding and although I would submit it is in the nature of a legal fiction that I Therefore, we submit that this decision should be affirmed. Thank you.

THE COURT: We will go off the record for about five minutes.

(A short recess was taken.)

THE COURT: The Court will come to order.

I find these facts to be established for present purposes: In May 1972, Plain-

tiff, who was then employed as an aerospace engineer, GS-861-15, Position Number 11939, at the Astronautics Laboratory, Marshall Space Flight Center, Alabama, was informed of an impending reduction in force, effective June 30, 1972.

On May 15, 1972, Plaintiff was offered reassignment within the Astronautics Laboratory as an aerospace engineer, GS-861-15, to Position Number 11938, effective June 30, 1972.

On May 18, 1972, Plaintiff formally indicated that he would accept the Position Number 11938 in lieu of his separation by reduction-in-force.

On June 30, 1972, after receiving a June 26th, 1972 memorandum, caption, "Assignment" and addressed to him by the Director of the Astronautics Laboratory, Plaintiff indicated in writing that he would not accept Position Number 11938, and that he un-

derstood that if he declined the offer of assignment, he would be separated from the federal service.

On June 30, 1972, Plaintiff also requested, in writing, that he not be considered within the class of employees covered by a temporary restraining order (in effect postponing the effective date of his proposed, individual reduction-in-force action), and that his separation be processed as of June 30, 1972.

Plaintiff was thereupon separated on June 30, 1972. He applied for and was granted an immediate Civil Service retirement annuity, having completed more than 31 years of federal service as of June 30, 1972.

Shortly thereafter, a very long and tortuous, and in all the circumstances, a highly unfortunate process of administrative and judicial considerations of Plaintiff's

claim, which was, in essence, that his separation from government service was invalid, and that he was, accordingly, entitled to reinstatement and back pay, began.

For present purposes, at least, that process is adequately and accurately described in Keller versus Merit Systems Protection Board, 679 Fed. 2nd, 220, Eleventh Circuit, 1982, transferring the matter to the United States Court of Claims, pursuant to 28 U. S. Code, Section 1406-C(1976).

The basis for that transfer, incidently, was that the United States District Court for the Northern District of Alabama, where Plaintiff had first sought judicial consideration of his claim in 1975, was without jurisdiction over it and that the District Court had substantially infringed on the exclusive jurisdiction of the Court of Claims over Plaintiff's claimed back pay.

In reaching that disposition, the Court of Appeals pointedly noted that the jurisdictional issue should have been raised much earlier in the proceeding and that the Government's procrastination in that and other respects had placed upon the District Court and upon Plaintiff Keller unnecessary and regrettable burdens.

I reiterate and share that judgment. The matters now before the Court are cross motion of summary judgment, and the deliberations in which I have been and am principally engaged in this case, I have considered not only the record on file with the Clerk's Office, the Administrative Record, the transfer file, the exhibits attached to the brief of the parties and Defendant's submission pursuant to my order.

But, I have also considered and carefully -- very carefully -- Plaintiff's submission, motion for leave to file which I

granted this morning. The Government, in its reply brief in this case, raised for the first time in the more than 12 years in which this case has been pending in one place or and other, the issue of the effect of Plaintiff's application for retirement benefits upon his right to challenge the propriety of his separation from Government Service.

I made clear to Counsel that I thought, in setting this case for argument, and I have made clear today, I am certain, my concern over this issue. I hold that the Government is not estopped from raising it, nor in any other way precluded from raising the defense.

I have carefully considered all of the cases cited by either party on this issue.

I find that Brown versus United States, 2 Claims Court, 587 (1983), affirmed MEM. 732 Fed. 2nd, 1627, governs the outcome of

this case, and Gonzales, against Department of Transportation, 701 Fed. 2nd 36, cited by Plaintiff, the Fifth Circuit, held that in the circumstances presented by that case, Plaintiff was entitled to a hearing before the Merit Systems Protection Board, I believe on the issue of the voluntariness of her resignation.

In that situation, however, the Plaintiff had been advised, explicitly that she could both appeal and either and also either resign or accept involuntary separation and still receive retirement pay. I find that situation distinguishable from the one presently before the Court and I might add that, in any event, it is not binding precedent on this Court as the decision of the Claims Court affirmed by the Court of Appeals for the Federal Circuit is.

I have carefully considered the distinctions between Brown and Plaintiff Keller,

urged by Counsel for Plaintiff, and I find no basis upon which ground can properly be distinguished, particularly when that case is read in the light of Kessner against the United States, 229 Fed. 2nd, 229 Court of Claims -- I think it is 755.

The proper citation to Kessner is 229 Court of Claims, 772.

Accordingly -- oh, I should say, I do not find Plaintiff's contentions of coercion valid. Plaintiff was offered another position within the Agency on June 30th. He was notified and he accepted that position. On June 30th, Plaintiff was informed that he could remain in his present position and have the effective date of his individual reduction-in-force notice deferred, and he declined in order to be sure, as I understand the situation that he would get a 4.5 percent cost of living annuity adjustment which might not be available to him if he

remained on the active payroll of the Agency past June 30th, 1972.

In all the circumstances, I can find no coercion and no deception; nothing else which would justify a departure from the holding in Brown against the United States.

Here, as in Kessner, I find that Plaintiff by accepted -- applying for and accepting retirement, voluntarily surrendered all claims to his former position.

His retirement, or separation, was not obtained by coercion or because he was affirmatively misled as to the effect of accepting retirement and therefore, those exceptions to the rule established by Kessner and Brown are not available.

The rule just announced is, as Judge Kozinski held in Brown, a harsh one. There is something not particularly good about a holding that a person who is separated from a position, for whatever reason, and who is

entitled because of prior service, has a statutory right to an immediate annuity, loses by applying for and accepting that right, the privilege of challenging his or her separation.

Nonetheless, I am bound by the law as it is proscribed by the Court of Appeals for the Federal Circuit, and its predecessor, the United States Court of Claims, and I therefore will file an order today -- or tomorrow -- directing that the Clerk dismiss the complaint herein for the reasons stated in the transcript.

In so holding, I do not reach or consider Plaintiff's merits arguments.

I want to thank both Counsel for their help, their vigorous arguments in approaching this case and for appearing before me. Is there anything further, Ms. Fennessy?

MS. FENNESSY: No, Your Honor.

MR. RICHARDSON: No, Your Honor.

THE COURT: Mr. Richardson, the judgment order will notify you of your rights to appeal, but in brief, see Federal Rule of Appellate procedure 4(a), 60 days from the date of the judgment of dismissal.

Thank you, Counsel.

(Whereupon, at 2:20 p.m., the hearing in the above-entitled matter was concluded.)

IN THE UNITED STATES CLAIMS COURT

No. 482-82C

(Filed: August 17, 1984)

GEORGE A. KELLER)
)
)
v.)
)
)
THE UNITED STATES)

ORDER

Oral argument in this case will be held commencing at 10:00 A.M., Wednesday, September 5, 1984, in Courtroom 8, Room 512, The National Courts Building, 717 Madison Place, N.W., Washington, D.C. 20005. Should either party anticipate needing more than 30 minutes for oral argument, counsel for that party should so advise the court, by letter to the judge, with a copy to opposing counsel, no later than Wednesday, August 29, 1984.

Counsel for defendant shall argue in person. Counsel for plaintiff may argue in

person or by telephone conference call to be placed by the court. Counsel for plaintiff should advise the judge's secretary, on or before Wednesday, August 29, 1984, as to the name of the attorney who will argue the case for plaintiff, and whether or not his appearance will be in person or by telephone.

At oral argument, counsel should be prepared to discuss, among other cases, Raymond Brown v. United States, 2 Cl. Ct. 586 (1983), affirmed 732 F.2d 167 (Fed. Cir. 1984). A copy of the Claims Court decision in Brown, and of the unpublished opinion of the United States Court of Appeals for the Federal Circuit affirming that decision, are attached to plaintiff's copy of this order.

IT IS SO ORDERED.

/s/ Harry E. Wood
Harry E. Wood
Judge

IN THE UNITED STATES
CLAIMS COURT

RAYMOND BROWN,	)	
	)	
Plaintiff,	)	
	)	
V.	)	No. 357-82C
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

June 10, 1983

KOZINSKI, Chief Judge

ORDER

Plaintiff challenges his 1974 removal from the United States Forest Service. His challenge was given careful administrative review both within the agency and by the Civil Service Commission, and was rejected. Plaintiff nevertheless claims that his removal was improper because it was based on arbitrary and capricious agency decisions and was not in accordance with agency regulations.

The record reveals that the Forest Service informed plaintiff by letter dated March 4, 1974, that he would be separated from the service effective March 18. On March 7, plaintiff was instructed by the agency's personnel chief that he should apply for retirement benefits under 5 U.S.C. §8336(d). Plaintiff completed an application that same day. The Civil Service Commission eventually approved the application and in late 1974 plaintiff began receiving retirement pay effective the date of his removal.

[1] The Court of Claims has held that where an employee has accepted retirement he is precluded from seeking reinstatement and back pay. Kestner v. United States, No. App. 19-81 (Ct. Cl. Jan. 15, 1982); Taylor v. United States, 219 Ct. Cl. 86, 591 F.2d 688 (1979). The court reasoned that, by accepting retirement, the employee has

voluntarily surrendered all claims to his former position. The only exceptions to this rule are where the retirement was involuntary because it was obtained by coercion or because the employee was affirmatively misled as to the effect of accepting retirement. Taylor, 219 Ct. Cl. at 92-93, 591 F.2d 688.

[2,3] This record discloses neither coercion nor deception, although it appears that plaintiff was not advised that by accepting retirement he would be surrendering his claim to his former position. Failure to counsel a plaintiff as to the effect of accepting retirement does not, however, render the retirement involuntary. While the rule enunciated by the Court of Claims is a harsh one, this court is not free to disregard it. General Order No. 1, 1 Cl. Ct. Rules 1 (1982); Connolly v. United States, 1 Cl. Ct. 312,

321 n. 11 (1982). The court therefore concludes that plaintiff's claim is barred by his acceptance of retired status.

Defendant's summary judgment motion is granted and the clerk is directed to dismiss the petition.

No costs.

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RAYMOND BROWN,	)	
	)	
Appellant,	)	
	)	
v.	)	Appeal No. 83-1248
	)	
THE UNITED STATES,	)	
	)	
Appellee.	)	

DECIDED: February 22, 1984

Before BENNETT, Circuit Judge, SKELTON, Senior Circuit Judge, and MILLER, Circuit Judge.

PER CURIAM.

DECISION

This is an appeal from a decision of the United States Claims Court, Cl. Ct. No. 357-82C (order, June 10, 1983), granting

defendant's motion for summary judgment and dismissing the claim. We affirm.

OPINION

In a reorganization of Region 10 of the Forest Service, appellant was one of seven employees ordered to transfer from Juneau to Sitka, Alaska. Appellant refused to accept the transfer and was separated from his employment, effective March 18, 1974, for failure to report to duty as assigned. His position was filled by another employee. Prior to the latter date he applied for retirement, which was approved.

After unsuccessfully exhausting his administrative appeals, he filed suit in the Claims Court for back pay and reinstatement, claiming procedural error and denial of due process in his removal. The Claims Court found that neither coercion nor deception induced his retirement, and since it was voluntary he had not stated a claim on which

relief could be granted. Numerous court precedents support the granting of summary judgment to the government in this case. We have given close attention to appellant's four major disagreements with the result, but find no reversible error in the decision appealed.

83-1248

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GEORGE A. KELLER,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	NO. 81-7696
	)	
MERIT SYSTEMS PROTECTION BOARD,	)	
	)	
and	)	
	)	
JAMES M. BEGGS, Administrator, et al.,	)	
	)	
Defendants-Appellants.	)	

Non-Argument Calendar

June 21, 1982

Before RONEY, KRAVITCH and CLARK, Circuit Judges.

PER CURIAM:

In June 1972, appellee George Keller was involuntarily terminated from his employment as an aerospace engineer for the

National Aeronautics and Space Administration (NASA) pursuant to a reduction in force within that agency. He appealed the termination decision to the United States Civil Service Commission, which upheld the termination. After exhausting his administrative remedies, appellee filed a pro se complaint in federal district court asserting in essence that the Commission's[1] decision was arbitrary and unsupported by the evidence and seeking reinstatement and backpay accruing from the date of termination. The court entered judgment for appellee, holding that the Commission's failure to respond to several issues raised by appellee and its application of an incorrect legal standard

[1]The Civil Service Commission was reorganized into the Office of Personnel Management and the Merit Systems Protection Board pursuant to the Civil Service Reform Act of 1978, Pub.L.No. 95-454, 92 Stat. 1111 (1978). The latter was thereafter substituted as party defendant in this case.

to another rendered its decision arbitrary and violated appellee's right to due process. Accordingly, the court remanded the case to the Commission with instructions to respond to and make findings on the contested issues. On remand, the Commission again upheld the termination and denied appellee relief. Appellee sought review in the district court, which reversed the decision of the Commission on the ground that it was unsupported by the evidence and ordered reinstatement of appellee with backpay. The Commission appealed.

The Commission challenges the district court decision on several grounds including that the district court was without jurisdiction to adjudicate appellee's claim. The Commission relies on the Tucker Act (current version codified at 28 U.S.C. §§ 1346, 1491 and other scattered sections). The pertinent parts of that act provide the

Court of Claims with jurisdiction over nontort claims against the United States[2] and confer concurrent jurisdiction on federal district courts over such claims not exceeding $10,000 in

[2]28 U.S.C. § 1491 provides in part:
The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.... To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

amount.[3] Appellant contends that because the backpay award appellee seeks will exceed $10,000[4] his backpay claim is within the exclusive jurisdiction of the

[3]28 U.S.C. § 1346(a)(2) provides in part:
(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims of:
(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, ...

[4]Appellant submits figures indicating that backpay accruing from the date of appellee's termination in June 1972 through August 1981, less various retirement and other benefits received by him during that period, totals $106,708.26. Appellee does not contest these figures. When appellee filed this action in 1975, three years had passed from the date of his termination. Although appellee's pro se complaint did not specifically state the amount of the backpay he sought, simple division indicates that an award based on three years of backpay would have exceeded $10,000. Hence, as of the date of the initial complaint, which is the relevant document for determining subject matter jurisdiction, see Carter v. Seamans, 411 F.2d 767, 770-71 & n.4 (5th Cir. 1969), cert. denied, 397 U.S. 941, 90 S.Ct. 953, 25 L.Ed.2d 121 (1970), appellee's backpay claim against the Commission exceeded $10,000.

Court of Claims. Appellant asserts that the district court further erred by ruling on the reinstatement issue because its adjudication of the reinstatement claim indirectly decides the backpay claim thus undermining the province of the Court of Claims.

[1] Our first duty is to determine whether this case is properly within the subject matter jurisdiction of the district court. Mansfield, Coldwater & Lake Michigan Railway v. Swan, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462 (1884). See Fed.R.Civ.P. 12(h)(3). Appellee cites a variety of statutory provisions that he claims supported the district court's exercise of jurisdiction. Most of these simply do not authorize jurisdiction. For example, appellee's contention that jurisdiction was authorized by the Administrative Procedure Act, 5 U.S.C. §§ 701-706 was rejected by the

Supreme Court in Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). Appellee asserts that a cause of action under 5 U.S.C. §§ 3501-3504 (Veterans' Preference Act) and id. § 5596 (Backpay Act) is cognizable under the general federal question jurisdiction, 28 U.S.C. § 1331. The former Fifth Circuit and other circuits have held that the Tucker Act's grant of jurisdiction to district courts over damages claims against the United States not exceeding $10,000, by implication, renders exclusive the Court of Claims' jurisdiction over claims against the United States exceeding that amount. Graham v. Henegar, 640 F.2d 732, 734-35 & nn. 5-6 (5th Cir. 1981) (and cases cited therein).[5] "The Court of Claims is the sole forum for the adjudication of [a claim against the United

[5]The Eleventh Circuit adopted the decisions of the former Fifth Circuit as precedent in Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

States exceeding $10,000], even though the claim would otherwise fall within the coverage of some other statute conferring jurisdiction on the district court." Id. at 734. See also Carter v. Seamans, 411 F.2d 767 (5th Cir. 1969), cert. denied, 397 U.S. 941, 90 S.Ct. 953, 25 L.Ed.2d 121 (1970) (no jurisdiction over backpay and reinstatement claim of discharged Air Force captain under mandamus statute since Tucker Act provides adequate remedy in Court of Claims). Because appellee's backpay claim exceeded $10,000 at the time he initiated this action, see note 4 supra, the district court was without jurisdiction to adjudicate that claim.

[2] The question remains whether even if adjudication of appellee's backpay claim is beyond the power of the district court, the court's decision of his right to reinstatement was proper. We conclude that

it was not. Appellee's entitlement to reinstatement is based on the same factual predicate as his right to backpay. Moreover, he asserts essentially the same legal bases for both forms of relief. In short, although he seeks two types of relief he presents but one claim. The district court's resolution of appellee's right to reinstatement effectively disposed of all issues concerning his right to backpay except the amount. Hence such adjudication by the district court substantially infringed on the Court of Claims' exclusive jurisdiction over appellee's backpay claim. Many cases have held that a government employee alleging wrongful discharge and seeking both backpay and nonmonetary relief must adjudicate his entire action in the Court of Claims. E.g., Sheehan v. Army and Airforce Exchange Service, 619 F.2d 1132, 1137 n. 7 (5th Cir. 1980), rev'd on other

grounds, ____ U.S. ____, 102 S.Ct. 2118, 72 L.Ed.2d 520 (1982) (plaintiff amended complaint on appeal waiving request for monetary relief in excess of $10,000; Denton v. Schlesinger, 605 F.2d 484 (9th Cir. 1979) (backpay, damages and reinstatement); Cook v. Arentzen, 582 F.2d 870 (4th Cir. 1978) (backpay, damages, and reinstatement); Polos v. United States, 556 F.2d 903 (8th Cir. 1977) (backpay and injunction to allow plaintiff to participate in retirement program); Mathis v. Laird, 483 F.2d 943 (9th Cir. 1973) (backpay and promotion). The cases reaching the opposite result are distinguishable. E.g., Sheehan v. Army and Airforce Exchange Service, 619 F.2d 1132, 1137 n. 7 (5th Cir. 1980) rev'd on other grounds, _____ U.S. _____, 102 S.Ct. 2118, 72 L.Ed.2d 520 (1982) (plaintiff amended complaint on appeal waiving request for monetary relief in excess of $10,000); see,

e.g., Beller v. Middendorf, 632 F.2d 788, 799 (9th Cir. 1980), cert. denied, 454 U.S. 855, 102 S.Ct. 304, 70 L.Ed.2d 150 (1981) (primary relief sought by plaintiffs was nonmonetary relief of type Court of Claims not empowered to grant); Glines v. Wade, 586 F.2d 675 (9th Cir. 1978), rev'd on other grounds, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980) (same); Giordano v. Roudebush, 617 F.2d 511 (8th Cir. 1980) (plaintiff's backpay claim was worth only $6,000 at time suit was filed); White v. Bloomberg, 501 F.2d 1379, 1384 n.6 (4th Cir. 1974) (suit brought against Post Office under special jurisdictional act).

[3] Where we determine that a case should be adjudicated in the Court of Claims, we have the authority to transfer it there directly "in the interest of justice" rather than dismissing the suit. Graham v. Henegar, 640 F.2d at 736; Dr. John T.

MacDonald Foundation v. Califano, 571 F.2d 328, 332 (5th Cir.) (en banc), cert. denied, 439 U.S. 893, 99 S.Ct. 250, 58 L.Ed.2d 238 (1978). We conclude that such transfer is the appropriate disposition of this action.[6]

TRANSFERRED to Court of Claims, 28 U.S.C. § 1406(c).

[6]We reach this disposition because we are persuaded by the authorities cited that it is the legally correct one. However, we note that appellant, in the interest of judicial economy and to avoid undue prejudice to the claimant, should have raised this jurisdictional challenge earlier in the proceedings. Appellant's procrastination in this and other respects has placed upon the district court and appellee unnecessary and regrettable burdens.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

GEORGE A. KELLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	75-G-0846-NE
ROBERT EL. HAMPTON, et al., Commissioners, United States Civil Service Commission,	)	
	)	
and	)	
	)	
WILLIAM P. BERZAK, et al., Members, Board of Appeals and Review, United States Civil Service Commission,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This cause is before this court upon motion by the defendants for reconsideration of this court's order and memorandum opinion entered on April 29, 1980, which this court now chooses to withdraw. The procedural history in this cause is quite lengthy.

On May 15, 1972, plaintiff George A. Keller was reached by a reduction-in-force (hereinafter "RIF") at the George C. Marshall Space Flight Center. An offer of reassignment was made by the government, which offer was first accepted and then, upon receipt of an augmenting assignment[1], rejected. The plaintiff filed an appeal with the Director, Atlanta Region, U. S. Civil Service Commission, on July 17, 1972, in which he raised what this court believes are material and relevant contentions:

(1) That there were excessive restrictions within the competitive levels. That this reduction in the number of persons in each

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[1]By use of the terms "augmenting assignment" or "as augmented", the court is referring to the June 26, 1972 letter of assignment (A.R. p. 373), which augmented the job description for position number 11938.

level also reduced the competition and thus allowed arbitrary selection for a RIF.

(2) That there were excessive restrictions on competitive levels in the second round.

(3) That extended "Time Limited Assignments," in effect, virtually assured selection for a RIF. (A "TLA" is a temporary assignment to another job while being retained in the organizational structure of the original job. Plaintiff's contention is that by being absent from his "control organization" he was more likely to be selected for RIF than those persons who are presently working in the "control organization.")

(4) That the Commission failed to make a "reasonable" offer of change of

position. (Plaintiff alleges in effect that his education, training, and job experience qualify him as a general engineer and an engineering manager. His terminated assignment was as engineering project manager [position no. 11939]. It appears that the offered job was of a highly technical aerospace engineering nature [position no. 11938]. Plaintiff alleges he was unqualified for the job and the augmenting assignment which accompanied it, and that therefore no job was offered.)

At this point, this court takes notice of the fact that if plaintiff had refused the offer he would have been separated but would have retained his pen-

sion/retirement benefits. However, if he accepted the position and then was evaluated to be unqualified soon thereafter, he could have been terminated "for cause," thereby endangering his benefits.

(5) That the agency action retained employees with lesser retention rights in jobs for which plaintiff considers himself qualified.[2]

5 U.S.C. § 3502; 5 C.F.R. Part 351. Plaintiff herein has a property interest conferred by 5 U.S.C. § 3502 and the regulations thereunder that apply to competing em-

---

[2]The courts have held that RIF is proper only so long as the veteran preference eligibles are protected in regard to their seniority. Farrell v. Mooman, 85 F. Supp. 125 (N.D. Calif. 1949); Langham v. Reconstruction Finance Corp., 208 F.2d 556 6th Cir. 1953).

ployees. A competing employee is a career, nonprobationary employee in the competitive civil service. The property interest is in the nature of seniority rights among civil servants. 5 C.F.R. Part 351.404, 351.203(a), 2102(a) (1), 2101(1).

The findings of the Regional Appeals Examiner on September 19, 1972 denied the appeal. This decision failed to meet any of plaintiff's issues sufficiently, and several of them are not answered at all. The Regional Appeals Examiner's findings met only the points raised in issues three and four. He did so in a cursory and conclusory manner, finding number three "not material or relevant." He said of issue number four: "When there are one or more positions having the same representative rate of pay, the agency may reassign an employee to any

of them; the employee has no right to choose his assignment. Further, the employee is entitled to only one offer. If he refuses, he may be separated." No other findings are present and the aforementioned findings are conclusory and ignore the points raised.

The case was then appealed to the Civil Service Commission Board of Appeals and Review. The decision of the Examiner was affirmed on March 8, 1973. This decision also failed to address the pertinent exceptions raised by the plaintiff.

Plaintiff then filed an action pro se in this court on June 30, 1975. This court, upon review of the administrative record, concluded that the failure of the government to respond to each of the plaintiff's contentions was an arbitrary action which denied plaintiff his right to due process of law. 5 U.S.C. § 706; Appalachian Power Co. v. E.P.A., 447 F.2d 495 (4th Cir. 1973). The

court then remanded the cause to the Civil Service Commission on June 22, 1976. The remand instructed the Commission "to respond to all of the issues raised by the plaintiff, and to make additional findings on the issues which have not been responded to heretofore." (A.R. p. 271)

Since this June 1976 remand order was promulgated, a somewhat plodding compliance with this court's order has been attempted. The Regional Appeals Examiner gathered additional evidence on both the competitive level and the offer of change of position issues, and on May 12, 1977, issued a decision affirming the RIF. This decision by the Regional Office held that plaintiff's competitive level was not unduly restricted, since all of the positions plaintiff identified as those that should be in his competitive level were not of that level. They varied, it was held, by one or more im-

portant factors. The Regional Appeals Examiner also found that the plaintiff was qualified for the 11938 position because he met the minimum educational requirements and the position was one of the same representative rate. This decision ignored the "capacity, adaptability, and special skills needed" criteria required by 5 C.F.R § 351.702 by stating it was "subjective and discretionary in nature," therefore "we find that it is not subject to review." (A.R. p. 133)

The decision of the Regional Office was appealed to the Appeals Review Board which, after a year and one half, remanded part of the case back to the Regional Appeals Examiner in Atlanta on October 27, 1978. The Appeals Review Board adopted the Regional Appeals Examiner's findings and conclusions with regard to issues 1, 2, 3, and 5 (competitive levels, TLA assignment,

and retention of employees with lesser retention rights). It remanded issue number 4 dealing with the failure of the agency to make a reasonable offer of assignment because the Regional Appeals Examiner did not address the capacity, adaptability, and special skills criteria requ red by 5 C.F.R. § 351.701. The Appeals Review Board also stated: "It does not appear sufficient, in light of the highly specialized nature of the positions, to determine simply that the appellant possessed the basic qualifications for the position." (A.R. p. 59)

The Regional Appeals Examiner then referred the qualification issue to staffing specialists (personnel men) with instructions for them to conduct further inquiry into the qualification question. They found that the basic educational requirements were met because plaintiff possessed a B.S. degree from the United States Naval Academy

in science and engineering, navigation, and chemistry. In addition, he completed a number of hours of graduate work in electrical engineering, mathematics, and physics, but did not receive any degree. (A.R. p. 36) Furthermore, the staffing specialists stated that Mr. Keller's previous assignments gave him more than enough experience in an appropriate engineering field in order for him to meet the Civil Service Commission's standards and requirements for position number 11938 (A.R. p. 37).

Upon receiving the advisory opinion, the Regional Appeals Examiner affirmed the RIF action on January 8, 1979, by holding that plaintiff was qualified for position number 11938. Plaintiff appealed this decision to the Appeals Review Board (now Office of Appeals, Merit Systems Protection Board).

Having failed to receive a decision from the Appeals Review Board by October

1979, Mr. Keller filed a motion to compel action by the Board with this court. This motion was granted on October 24, 1979, as no final administrative decision had been rendered in accordance with the remand order which had been issued more than three years before. This court ordered the Office of Appeals Merit Systems Protection Board, to enter a final reviewable decision within ninety days, "responding to all of the issues raised by plaintiff in his appeal." (A.R. p. 6)

On December 10, 1979, the Office of Appeals rendered a final decision which was filed in this court on February 5, 1980. In this decision the only issue discussed and determined was whether the plaintiff was qualified for the assignment offered him (position number 11938). The other issues raised by Mr. Keller were not mentioned in this decision at all, although they were

previously decided in an earlier opinion rendered by the Appeals Review Board on October 27, 1978.

The Office of Appeals (formerly Appeals Review Board) adopted the findings of the Regional Appeals Examiner that Mr. Keller was qualified for position number 11938. It acknowledged that "the appellant's skill, knowledge and adaptability are such that although some orientation may be necessary to familiarize him with the projects involved in structural analysis and booster systems, he should not need a significant amount of training in the actual duties as to constitute a serious interruption". (A.R. p. 4)

This court is cognizant of the limited scope of its judicial review of an administrative agency's decisions as set forth in Harvey v. Nunlist, 499 F.2d 335, 336 (5th Cir. 1974), which limits the court's role to

"discerning whether procedural due process requirements were met and whether the agency action was arbitrary or capricious or unsupported by substantial evidence." This court finds that the Board has failed to comply with procedural due process requirements and that its action is unsupported by substantial evidence. Therefore the decision of the Office of Appeals is hereby vacated and the plaintiff's motion for an appropriate order of reinstatement granted as it is unsupported by substantial evidence. Alternatively, the decision of the Office of Appeals is reversed as a sanction within the inherent power of the court to punish the administrative agency for its failure to respond, as ordered by this court, to all of the issues raised by the plaintiff.

The decision of the Office of Appeals is reversed as it is not supported by substantial evidence. The limited scope of

judicial review prohibits this court from substituting its judgment for that of the administrative agency's determination if it was supported by substantial evidence. This, however, does not mean that the court must "serve as a rubberstamp for thoughtless agency action." Central & So. Motor Freight Ass'n, Inc. v. I.C.C., 582 F.2d 113, 116 (1st Cir. 1978). In this case, the Office of Appeals' decision regarding the plaintiff's qualifications for position number 11938 as augmented is not supported by substantial evidence.

The qualification requirements are outlined in 5 C.F.R. § 351.701(a) which states:

> (a) Except as provided in § 351.702, an employee is qualified for assignment under § 351.603 if the employee:
>
> (1) Meets the Office standards and requirements for the position, including any minimum educational requirement;
>
> (2) Is physically qualified for the duties of the position;
>
> (3) Meets any special qualifying condition which the Office has approved for the position; and

> (4) Has the capacity, adaptability, and any other special skills needed to satisfactorily perform the duties and responsibilities of the position without undue interruption to the activity.

Subsections (1) and primarily (4) are the only ones at issue in this case.

Qualification item (1) dealing with minimum educational requirements gives each agency some discretion in setting standards. The requirement for NASA positions, GS-7/15, is as follows:

> Successful completion of a standard professional curriculum in an accredited college or university leading to a bachelor's degree with major study in an appropriate field of engineering, physical science, life science, or mathematics ... .

(A.R. p. 17) [Emphasis added.] As discussed above, plaintiff did receive a B.S. degree in Naval Science and Engineering and had completed part of a master's program in electrical engineering. Position number 11938 as augmented involves specialization in aero-

dynamic design and testing ... a far cry from Naval Engineering or electrical engineering studies. Mr. Keller's engineering qualifications were in a totally different field of engineering from aerospace engineering; the engineering field involves different specialties and a person qualified in one type of engineering is unqualified to work in another with the same degree of skill. Furthermore, Mr. Keller had been in a managerial type position, which did not qualify him for a position involving design and testing. While Mr. Keller did meet the minimum educational requirements for the more general, managerial type position number 11939, his education was obviously not sufficient for the highly specialized area covered by position number 11938 as augmented.

The capacity, adaptability, and special skills criteria (5 C.F.R. § 351.701(a)(4))

involves the same discrepancy as noted above. The advisory opinion (A.R. pp. 17-20) submitted by staffing specialists that was heavily relied on by both the Regional Appeals Examiner and the Office of Appeals in their decisions places much importance on the fact that "the two position descriptions are identical in all respects except position number 11938 involved 'aerodynamic design and testing efforts,' whereas, position number 11939 involved, 'Scientific Requirements as Related to Specific Project Assigned." (A.R. p. 19) (emphasis added). That "except" is a substantial one as the vast difference between the two jobs is caused by those different, additional terms describing the positions. The marked difference between position numbers 11938 and 11939 is described by NASA which stated in a letter to the Regional Appeals Examiner that: "... it can readily be seen that posi-

tion #11938 involves specialization aerodynamic design, testing, and qualification, whereas position 11939 is more general in nature ... ." (A.R. p. 144).

The Office of Appeals seems to adopt the position that the plaintiff can adapt to the highly specialized and technical position involving aerodynamic design and testing "without undue interruption to the activity" because he has held a number of other jobs in the same GS grade with similar job descriptions. As noted above, the words may be nearly the same but the jobs may vary greatly with the addition of a few additional terms describing the duties. The Office of Appeals Review did concede that Mr. Keller would need some orientation to familiarize him with the projects he would be in charge of but did not deem this to be enough "to constitute a serious disruption." (A.R. p. 3). Mr. Keller claims that he has

no background in the specialized field of aerodynamic design and testing and that his prior educational training and job assignments do not prepare him for position number 11938 as augmented without further substantial education and training. The administrative record appears to substantiate the plaintiff's position and not provide substantial evidence for the Office of Appeals' decision declaring plaintiff to be qualified for position #11938 as augmented.

Perhaps the major inconsistency in the Office of Appeals' decision is narrow, restrictive treatment given to the competitive levels and the broad, loose fashion used in determining whether an employee is qualified for an assignment. If the positions are so specialized and technical as to require many different competitive levels then it is difficult to understand how a civil servant with a general engineering-manager back-

ground may be loosely determined to possess the highly technical skills necessary for aerodynamic design and testing or the adaptability to quickly learn those skills without seriously disrupting the activity.

It is possible for an employee to possess various skills and the educational background that would qualify him for several positions in different competitive levels. In this case there is no substantial evidence supporting the Office of Appeals' decision that Mr. Keller is one of those people so as to render him qualified for both positions 11939 and 11938 as augmented. As the Office of Appeals' decision is not supported by substantial evidence, it is hereby reversed and rendered.

Alternatively, the decision of the Office of Appeals is reversed as a sanction within the inherent power of the court to punish the administrative agency for its

failure to respond, as ordered by this court, to all of the issues raised by the plaintiff. An administrative agency is not authorized to ignore material facts. N.L.R.B. v. Cleveland Trust Co., 214 F.2d 95 (6th Cir. 1954). Its comments must be responsive to plaintiff's allegations. Meadville Master Antenna, Inc. v. F.C.C., 443 F.2d 282, at 288 (3d Cir. 1971). The narrow scope of review does not mean the court must rubber-stamp the agency's orders. It is incumbent upon the court to insure these decisions are based upon a consideration of all relevant factors. American Paper Institute v. Train, 543 F.2d 328 (D.C. Cir. 1976).

It appears that the Office of Appeals and the Regional Appeals Examiner have failed to consider whether the plaintiff was qualified for position number 11938 as augmented. A thorough review of the adminis-

trative record has revealed that only the issue of qualification for position number 11938 was discussed and determined without regard for the augmenting assignment.

Furthermore, the review process was extremely sluggish as it took three and one half years for the Office of Appeals to render a final decision in accordance with this court's 1976 remand order. Even this final decision was fragmentary in that the only issue discussed in the December 10, 1979, decision was the qualification issue. There is no final decision addressing all of the issues raised by the plaintiff contained in a single opinion. In order to discover the other findings of the Board, this court had to delve into the administrative record and search at great length for earlier decisions on the other issues raised by the plaintiff.

Normally, the above described non-compliance with this court's remand order

would necessitate another remand to the Office of Appeals. After over eight years this would not do justice. The Board after three and one half years has still failed to fully render a decision in complete accordance with the 1976 remand order. It has failed to address plaintiff's qualifications for position number 11938 as augmented. This court can find little justification for such a delay and agrees with the court in Nader v. F.C.C., 520 F.2d 182, 206 (D.C. Cir, 1975), which stated: "There comes a point when relegating issues to proceedings that go on without conclusion in any kind of reasonable time frame is tantamount to refusing to address the issues at all--and the result is a denial of justice."

District courts possess discretionary power to fashion appropriate equitable relief when a party is prejudiced by the unreasonable actions of an agency. E.E.O.C.

v. Liberty Loan Corp., 854 F.2d 853 (8th Cir. 1978). As found in Liberty Loan, the court can render a just result in light of the attending circumstances peculiar to a case. The court also possesses the power, whether it be deemed inherent or by virtue of the Federal Rules, to impose sanctions which reflect the severity of the conduct and the attendant circumstances. The power may be analogized to the power to dismiss a case where there is a clear record of delay or contumacious conduct, and a finding that lesser sanctions would not serve the system of justice. Wrenn v. American Cast Iron Pipe Co., 575 F.2d 544 (5th Cir. 1978); Fed. Rules Civ. Pro. 41(b). The power to fashion a remedy to fit the facts is also similar to the court's ability to punish for contempt and to create sanctions to give relief for failure to comply with reasonable discovery requests. Fed. Rules Civ. Pro. 37(b).

While the order of this court in dealing with an administrative agency is usually in the nature of a remand, it is the finding of this court that such a mild sanction would not serve the system of justice in this situation. A federal court's discretion includes the power to fashion a sanction to fit the circumstances. Accordingly, plaintiff's motion for review and for an appropriate order of reinstatement will be granted, with plaintiff to be reinstated to his original position or to a suitable position of equal grade level in Huntsville, Alabama together with back pay, as a sanction for the Office of Appeals' failure to fully respond to the qualifications issue regarding position number 11938 as augmented as ordered originally by this court's order of June 22, 1976, and again by this court's order of October 24, 1979.

Accordingly, plaintiff is ordered reinstated to his original for the alter ative reasons given position or to a suitable position of equal grade level in Huntsville, Alabama, together with back pay. The parties shall try to agree on the position and amount of back pay; otherwise, within sixty (60) days of the date of this order, the parties shall submit to the court their positions, in writing.

A separate order in conformity with this Memorandum Opinion will be entered this date.

DONE this the 26th day of June, 1981.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

MERIT SYSTEMS PROTECTION BOARD

Washington, D.C.

December 10, 1979

IN THE MATTER OF	)	
	)	
	)	TYPE CASE: Reduction-in-force
GEORGE A. KELLER	)	
	)	

BEFORE: Panel Member Tillman - Affirm
Panel Member Cohen - Affirm
Panel Member Smith - Affirm
By Unanimous Decision - Affirm

INTRODUCTION

The appellant appealed from a January 8, 1979 decision of the Atlanta Field Office, which found that there was no violation of the appellant's rights under the reduction-in-force regulations.

STATEMENT OF THE CASE

The record indicates that the agency (National Aeronautics and Space Administration, Marshall Space Flight Center, Huntsville, Alabama), by reduction-in-force

notice, informed the appellant that due to a reduction of permanent positions, he was being reassigned from the position of AST, Flight Systems, GS-15 (#11939) to AST, Flight Systems, GS-15 (#11938), in lieu of separation. Appellant initially accepted this offer, but subsequently declined the offer, resulting in his separation effective June 30, 1972.

Appellant appealed to the Atlanta Field Office, which found no violations; that determination was affirmed by the former Board of Appeals and Review. After filing of a civil action, the case was remanded to the Field Office, which issued a decision dated May 12, 1977, finding that the agency had acted in compliance with the relevant Federal regulations. In its decision of October 27, 1978, the Appeals Review Board (now Office of Appeals, Merit Systems Protection Board) remanded the case to the

Field Office for further development and a new adjudication on the matter of appellant's qualifications to perform the duties of the position of Aerospace Engineer, GS-15, position #11938 (as augmented), thus leading to the Field Office decision of January 8, 1979.

FIRST LEVEL DECISION

In its decision issued January 8, 1979, the Atlanta Field Office found no irregularities under the terms of the reduction-in-force regulations, and sustained the agency action.

REPRESENTATIONS TO THE BOARD

Appellant contended that, despite the advisories relied upon by the Field Office, a determination of his qualifications for position #11938, as augmented by letter of assignment dated June 26, 1972, has not been made; and that he did not possess the qualifications and experience necessary for that

position without additional training and orientation.

ANALYSIS AND FINDINGS

As indicated above, the sole issue before the Board, as well as the Field Office, is whether appellant is qualified for position #11938 (the position offered in lieu of separation). The Board has throughly reviewed the entire appellate record developed and relied upon by the Field Office, including the advisory opinions from the former Civil Service Commission's Atlanta Regional Office (which, through training and experience, is competent to determine issues of qualifications), in order to determine whether, on the basis of that record and in light of the representations submitted on further appeal to the Board, the Field Office was correct in affirming the reduction-in-force action at issue herein.

In effecting a reduction-in-force (RIF) action, an agency is obligated to comply with the requirements of part 351 of title 5, Code of Federal Regulations. It is the responsibility of the Board, pursuant to its appellate authority, to review appeals from reduction-in-force actions to determine whether if the appellant was so entitled, he received the most reasonable offer of assignment to which he was entitled under the regulations.

The agency has contended, in effect, that the appellant meets minimum qualifications for position #11938, as augmented, and, apparently that his placement therein would not constitute serious undue interruption to the agency's activities. In this regard, the Field Office found that the appellant was qualified for assignment and had entitlement to the position in question. This finding was based on an advisory qualifications

opinion from the former Commission's Regional Office, which stated, in pertinent part, that:

> . . . the appellant possessed the basic educational requirements for the position in question. Furthermore, his SF-171 documents experience in AST, Nuclear Propulsion and Power, Supervisory Aerospace Engineer and Aerospace Engineer in positions at grade GS-15 at the . . . Center from July 1963 to June 30, 1972, a period of almost nine years, which is more than enough to satisfy the grade level requirement of the grade level requirement of the qualifications standard . . . .
>
> Therefore, on the basis of the appellant's successful employment history in high level engineering/scientific positions over a long period of time, and his experience in a position of similarity in terms of title, series, grade and actual duties and responsibilities, it is both reasonable and logical to conclude that he did possess, at the time the offer was made, the capacity, adaptability and special skills necessary for successful performance....

The appellant took issue with the above determinations of eligibility for position

#11938, and the Staffing Division was requested by the Field Office to reevaluate its earlier opinion, in light of the further representations submitted by the appellant (which stated, in part, that the advisory ignored the augmenting letter of assignment, dated June 26, 1972, to include assignments in structural analysis, dynamics, and computer science). The Staffing Division replied as follows:

> . . . we thoroughly examined his record of education and experience in high level professional engineering positions over a long period of time and concluded that (1) he possessed the minimum requirements for the position; and (2) he had the capacity, adaptability, and special skills necessary to perform the duties of the position in question in a satisfactory manner.

The Board has reviewed the advisories, as well as the appellant's representations in support of his contention that he does not sufficiently possess the qualifications required for the position concerned. Having

reviewed the record, the Board concurs in the previous findings of the Field Office that the appellant is qualified for assignment to position number 11938, as augmented, and, therefore, the action taken by the agency in effecting the appellant's reassignment was not a violation of appellant's assignments rights under part 351 of the regulations.

While the appellant has not performed certain duties specifically stated in the letter of assignment of June 26, 1972, based upon review of the appellant's record of education, training and experience, the Board agrees with the determination that the appellant is sufficiently qualified in these respects. The issue of appellant's qualifications was one of fact to be determined by the Field Office. Thus, the decision will not be disturbed unless it is plainly wrong or without evidence to support it. Here

there is credible evidence to support the finding.

The Board further finds that the appellant's skill, knowledge and adaptability are such that although some orientation may be necessary to familiarize him with the projects involved in structural analysis and booster systems, he should not need a significant amount of training in the actual duties as to constitute a serious interruption. Moreover, the record indicates that the assignments were appropriate for one of appellant's grade and experience, and within the scope of his previous duties and responsibilities within the agency in highly technical aerospace engineer positions.

DECISION

In view of the foregoing, and as a result of its consideration of the appellate record in this case, the Board hereby affirms the Jan-

uary 8, 1979 decision of the Atlanta Field Office with respect to position #11938. Federal regulations provide that the decision of the Board is final and that there is no further right of administrative appeal.

For the Board:

/s/ Cameron C. Smith
Cameron C. Smith, Director
Office of Appeals

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

GEORGE A. KELLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	75-G-0846-NE
ROBERT E. HAMPTON, et al., Commissioners, United States Civil Service Commission,	)	
	)	
and	)	
	)	
WILLIAM P. BERZAK, et al., Members, Board of Appeals and Review, United States Civil Service Commission,	)	
	)	
Defendants.	)	

ORDER

This cause came to be heard upon motion of plaintiff, George A. Keller, to compel action by the Office of Appeals Review, Merit Systems Protection Board. Having considered the motion, the court is of the opinion it is due to be granted.

Accordingly, it is ORDERED that the Office of Appeals Review, Merit Systems Protection Board enter, within ninety (90) days of the date of this order, a final reviewable decision in the above-styled case, responding to all of the issues raised by plaintiff in his appeal.

DONE and ORDERED this 24th day of October 1979.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA 30309

APPEAL OF MR. GEORGE A. KELLER
UNDER PART 351, TITLE 5,
CODE OF FEDERAL REGULATIONS
DECISION NUMBER AT035190022
DECIDED ON JANUARY 8, 1979

I. INTRODUCTION

By reduction-in-force notice dated May 15, 1972, the above-referenced appellant was informed that he would be reassigned from the position of Aerospace Engineer (AST, Flight Systems), GS-861-15 (position number 11939), to the position of Aerospace Engineer (AST, Flight Systems), GS-861-15 (position number 11938), at the National Aeronautics and Space Administration, Marshall Space Flight Center, Huntsville, Alabama, effective June 30, 1972. The appellant declined this offer; requested that he not be considered with the class of employees covered by the temporary

restraining order issued by the U.S. District Court of the District of Columbia; and asked that his resignation-reduction in force be effected on June 30, 1972. Thereafter, the action was effected as proposed.

II. PRIOR APPELLATE HISTORY

By letter dated July 14, 1972, the appellant filed a reduction-in-force appeal with the Atlanta Regional Office of the U. S. Civil Service Commission (subsequently, U. S. Civil Service Commission, Atlanta Field Office, Federal Employee Appeals Authority; now, Atlanta Regional Office, Merit Systems Protection Board). This office affirmed the agency's action by decision dated September 19, 1972.

The appellant appealed the decision of the Atlanta Regional Office to the U. S. Civil Service Commission's Board of Appeals and Review (subsequently, U. S. Civil Service

Commission, Appeals Review Board; now, Merit Systems Protection Board, Office of Appeals Review); however, by decision dated March 8, 1973, the decision of the Atlanta Regional Office was affirmed.

Thereafter, the appellant filed a suit in Federal Court. By Order dated June 22, 1976, the U. S. District Court for the Northern District of Alabama remanded the case to the U. S. Civil Service Commission's Appeals Review Board.

On August 5, 1976, that office, in accordance with the Order, rescinded the September 19, 1972 decision of the Atlanta Regional Office and remanded the case to this office for such proceedings as were necessary to comply with the Order.

By decision dated May 12, 1977, this office found that the agency had acted in compliance with the relevant regulations.

Accordingly, the agency action was sustained.

By letter dated May 27, 1977, the appellant appealed this decision to the Appeals Review Board. In its decision dated October 27, 1978, the Appeals Review Board rescinded the May 12, 1977 decision of the Atlanta Field Office, and remanded the case for further consideration and adjudication concerning the appellant's qualifications for position number 11938 -- the position to which the appellant was reassigned in connection with the reduction in force.

III. ANALYSIS AND FINDINGS

The sole issue to be determined is the appellant's allegation that he was not qualified for assignment to the position which he was offered (position number 11938). We referred this qualification issue to staffing specialists in the Atlanta Regional Office, U. S. Civil Service Comission, who,

through training and experience, are competent to determine such issues for an advisory opinion. We were advised that, based upon the appellant's record of education, training, and experience, he possessed the basic qualifications required for successful performance in position number 11938. We were further advised that his successful experience record in various positions with the agency indicated that he possessed the capacity, adaptability, and special skills required for successful performance of position number 11938. A copy of this advisory opinion dated Novemer 20, 1978 is attached to this decision as Enclosure 1.

Both parties were provided with a copy of the advisory opinion for their review and comments, and additional representations were submitted by the appellant. Because of the additional material submitted, this

office again referred the entire appeal file to the staffing specalists in order to determine whether the additional material warranted a change in their previous advisory opinion. In an advisory opinion dated December 19, 1978 (Enclosure 2), the staffing specialists found no evidence to change their previous advisory opinion. Based upon our review of the entire record, we adopt the staffing specialists' advisory opinions dated November 20 and December 19, 1978 as being dispositive of the qualification issue raised in this case. We note that, in a letter to this office dated April 6, 1977, the agency pointed out that the appellant had admitted to the Appeals Review Board that position number 11938 required specialized background skills in aerodynamic design and testing efforts that could not reasonably be expected of himself without opportunity for further

substantial education and training. We do not, however, interpret these comments by the agency to be an admission that their proposed reassignment of the appellant to this position on May 15, 1972, was arbitrary, unreasonable, or capricious. Rather, we interpret the statement as having been made in order to point out the appellant's own acknowledgement that the duties of the two positions were substantially different and his inconsistency in alleging, on one hand, that he was not qualified for position 11938, while at the same time arguing that this position should have been placed in his competitive level. There is no evidence that the statement was referenced to show that the appellant was not qualified for position number 11938. For, the agency's remarks were made in response to the appellant's competitive level claims, and

not with respect to the issue of the appellant's qualifications for position number 11938. Competitive level determinations are made on the basis of qualification requirements of positions, rather than on the qualifications of employees. Thus, the appellant's qualifications were not relevant to the issue for which the April 6, 1977 letter was provided.

IV. CONCLUSION

Our review of the facts and circumstances relating to the issue presented to this office disclosed no violation of the appellant's rights under reduction-in-force regulations.

V. DECISION

The reduction-in-force action is affirmed.

VI. FURTHER RIGHT OF APPEAL

Unless this decision is further appealed within 15 calendar days of the day on which

it is received, it becomes the final decision of the Merit Systems Protection Board. Any further appeal of this decision must be sent directly to:

Office of Appeals Review
Merit Systems Protection Board
1717 H Street, N.W.
Washington, D. C. 20419

Two copies of the letter of further appeal and all representations which the Board should consider beyond those now in the appeal file must be submitted within the 15 calendar day time limitation.

For the Board:

/s/ Lyman C. Duncan, Jr.
LYMAN C. DUNCAN, JR.
Chief Appeals Officer

UNITED STATES CIVIL SERVICE COMMISSION
APPEALS REVIEW BOARD
Washington, D. C. 20415

D E C I S I O N

IN THE MATTER OF)
)
) TYPE CASE: Reduction in Force
)
George A. Keller)

BEFORE: Member Tillman--Rescind/Remand
Member McDonald--Rescind/Remand
Member Jeffries--Rescind/Remand
By Unanimous Decision--Rescind/Remand

INTRODUCTION

The appellant appealed to the Board by letter of May 27, 1977, from the May 12, 1977 decision of the Atlanta Field Office, Federal Employee Appeals Authority. The Field Office found that the agency, National Aeronautics and Space Administration (NASA), did not violate the appellant's reduction-in-force rights.

STATEMENT OF THE CASE

The record shows that the agency issued to the appellant a final notice, dated May 15, 1972, informing him that a reduction of permanent civil service positions at Marshall Space Flight Center, Alabama, was necessary during the fiscal year; that he had been reached for reduction-in-force (RIF) action; and was being reassigned from the position of AST, Flight Systems, GS-15 (position #11939) to AST, Flight Systems, GS-15 (#11938), in lieu of separation. Appellant accepted the above offer of assignment, but subsequently declined the offer, resulting in his separation effective June 30, 1972.

Appellant appealed to the Atlanta Regional Office, which by decision dated September 19, 1972, denied the appeal because the issues raised in the appeal disclosed no violations. The Board of Appeals and Review (now Appeals Review Board) affirmed the

Regional Office by decision dated March 8, 1973.

Subsequently, appellant filed a civil action in the United States District Court for the Northern District of Alabama, which by their Order, dated June 22, 1976, remanded the case to the Civil Service Commission "to take further testimony in the case, to respond to all of the issues raised by [appellant], and to make additional findings on the issues which have not been responded to heretofore." The Board, by decision dated August 5, 1976, remanded the case to the Atlanta Field Office of the Federal Employee Appeals Authority for such proceedings as were necessary to comply with the Order of the Court. The Field Office, after additional documentation and representations from both parties, issued its decision.

FIRST LEVEL DECISION

The Atlanta Field Office, in its decision of May 12, 1977, noted the five issues appellant raised in his initial appeal to the Regional Office. It found that the agency had acted in compliance with the relevant Civil Service regulations. Accordingly, the agency action was sustained.

REPRESENTATIONS TO THE BOARD

The appellant has raised essentially the same contentions previously raised before the Field Office, which are set forth and discussed below.

ANALYSIS AND FINDINGS

The Board has thoroughly reviewed the appellate record developed and relied upon by the Field Office, including the advisory opinions from the Commission's Atlanta Regional Office Staffing Division regarding the competitive levels of the two positions involved (#11939 (old position) and #11938

(position appellant was offered)), to determine whether, in light of the representations to the Board, the Field Office was correct in concluding that the reduction-in-force action by which appellant was affected was accomlished in compliance with applicable regulations and instructions. Having done so, the Board concurs with the Field Office's assessment and analysis of the pertinent facts of the case, and adopts its findings and conclusions with regard to the following issues, remanded to the Commission by the U.S. District Court:

- o excessive restriction on competitive levels;
- o extended "Time Limited assignment"; and
- o retention of employees with lesser retention rights.

With regard to the alleged failure of the agency to make a reasonable offer of assignment, the key portion of the Field Office decision stated that:

> . . . the record reflects that the position offered to the appellant was in the same classification series (GS-861) as the position which he incumbered at the time of his resignation (position number 11939). 5 CFR 351.702 states that an agency may assign an employee in a reduction in force without regard to the Commission's standards and requirements for the position if: (a) he meets any minimum education requirements for the position; and (b) the agency determines that the employee has the capacity, adaptability, and special skills needed to satisfactorily perform the duties and responsibilities of the position . . . .

Relevant to the Board's consideration of the case, the Field Office decision concluded:

> In view of the fact that the determination that an employee has the capacity, adaptability, and special skills needed to satisfactorily perform the duties and responsibilities of the position is subjective and discretionary in nature, we find that it is not subject to review under the circumstances presented in this case. (Emphasis added)

In the Board's view, the Field Office erred in its disposition of this issue. The Board does not believe that the Field Office was

responsive to the Court Order, cited above, which remanded the question of whether the appellant was qualified for the job which was offered.

It is apparent from a reading of the Court's Order that the Court expected the field Office to consider the question of appellant's qualifications for the position offered in light of the agency's claim that "many jobs at the space center are so highly specialized that these jobs must be classified as one- or two-man competitive levels," and appellant's contention that he did not meet the educational requirements for the job. It does not appeal sufficient, in light of the highly specialized nature of the positions, to determine simply that the appellant possessed the basic qualifications for the position. In this connection, the Board notes the agency's April 6, 1977 letter to the Field Office, which, in

essence, agreed with the appellant that the position offered "requires specialized background and skills in aerodynamic design and testing efforts that could not reasonably be expected of [apellant] without opportunity for further substantial education and training."

DECISION

Accordingly, the Appeals Review Board hereby rescinds the decision of the Atlanta Field Office, issued May 12, 1977, and remands the case for further consideration and adjudication of the issue of appellant's qualifications for position #11938.

Civil Service Commission regulations provide that the decision of the Board is final and that there is no further right of administrative appeal. This means that the decision of the Board constitutes the exhaustion of administrative remedies.

However, section 772.312 of the Civil Service regulations provides that the Commissioners, in their discretion, and notwithstanding the exhaustion of the right of appeal or the pendency of suit, may reopen and reconsider any previous decision of the Appeals Review Board on their own motion or when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the decision of the Appeals Review Board was issued; or

(2) The previous decision of the Appeals Review Board involves an erroneous interpretation of law or regulation, or a misapplication of established policy; or

(3) The decision of the Appeals Review Board is of a precedential nature involving new or unreviewed policy considerations that may have effect beyond the case at hand.

If the agency has evidence or argument which

is believed to meet one or more of these criteria, it must submit its request for reopening not later than 30 days from the date of this decision.

If the appellant has evidence or argument which is believed to meet one or more of these criteria, a request for reopening must be submitted within a reasonable time after receipt of this decision.

Such request should be sent to:

Assistant to the Commissioners (Appeals)
U.S. Civil Service Commission
Washington, D.C. 20415

For the Board:

/s/ Peggy S. Griffiths
Peggy S. Griffiths
Chairman

October 27, 1978

UNITED STATES CIVIL SERVICE COMMISSION
FEDERAL EMPLOYEE APPEALS AUTHORITY
ATLANTA FIELD OFFICE
ATLANTA, GEORGIA 30309

APPEAL OF MR. GEORGE A. KELLER
UNDER PART 351, TITLE 5, CODE OF FEDERAL REGULATIONS
DECISION NUMBER AT035170206
DECIDED ON MAY 12, 1977

I. INTRODUCTION

By reduction-in-force notice dated May 15, 1972, the above-referenced appellant was informed that he would be reassigned from the position of Aerospace Engineer (AST, Flight Systems), GS-861-15 (position number 11939), to the position of Aerospace Engineer (AST, Flight Systems), GS-861-15 (position number 11938), effective June 30, 1972. The appellant declined this offer; requested that he not be considered within the class of employees covered by the temporary restraining order issued by the U. S. District Court of the District of

Columbia; and asked that his resignation-reduction in force be effected on June 30, 1972. Thereafter, the action was effected as proposed.

II. PRIOR APPELLATE HISTORY

By letter dated July 14, 1972, the appellant filed a reduction-in-force appeal with the Atlanta Regional Office of the U. S. Civil Service Commission (now Atlanta Field Office, Federal Employee Appeals Authority). This office affirmed the agency's action by decision dated September 19, 1972.

The appellant appealed the decision of the Atlanta Regional Office to the U. S. Civil Service Commission's Board of Appeals and Review (now Appeals Review Board); however, by decision dated March 8, 1973, the decision of the Atlanta Regional Office was affirmed.

Thereafter, the appellant filed suit in Federal Court. By order dated June 22,

1976, the U. S. District Court for the Northern District of Alabama remanded the case to the U. S. Civil Service Commission's Appeals Review Board.

On August 5, 1976, that office, in accordance with the Order, rescinded the September 19, 1972 decision of the Atlanta Regional Office and remanded the case to this office for such proceedings as are necessary to comply with the Order.

III. ANALYSIS AND FINDINGS

The Court found that the Commission had not considered the following issues raised by the appellant (plaintiff) in his initial letter of appeal:

(1) Excessive restriction on competitive level in the first round.

(2) Excessive restriction on competitive level in the second round.

(3) Retention of employees with lower retention rights.

The Court further found that the plaintiff (appellant) had been denied due process in that the Commission had not properly considered whether the appellant was qualified for the job which he was offered. The only remaining issue raised by the appellant concerned his allegation that "Time Limited Assignments" (TLA) reduced his competitive posture. With respect to this issue, the Court stated:

> While the use of TLA as it relates to RIF may warrant further examination, it is not necessary for a resolution of this case. This is so, not because the point is not relevant or material to the issue presented, but because the issue is inextricably interrelated with issues 1 and 2, and thus with the entire group of issues presented by the plaintiff.

In view of the above statement of the Court, the issue relating to TLA's will not be discussed specifically in this decision. It should be noted, however, that it is just as likely that the appellant was detailed to

such assignments because the agency had a more critical need to have him perform duties other than those set forth in his position description and that this ultimately lead to the decision to abolish his position.

In any event, however, it is clear that reduction in force may be necessary because of conditions either inside or outside the agency. Agency management may reduce certain phases of its work as the work load changes. Appropriations may be reduced or cut-off entirely, or the agency may be allowed to use only part of its appropriations. These and many other factors occurring singly or in combination may make it necessary for the agency to have a reduction in force.

Reduction in force may require the separation of all employees in part of an agency or may require separation of some and

shifting about of others. Small reductions may require no involuntary separations, when there are enough transfers, retirements, and other voluntary losses. Some reductions, in fact, require no reduction in the number of employees they are accomplished through reorganization.

Planning the work program and organizing the work force to accomplish agency objectives within available resources are management responsibilities. Only the agency can decide what positions are required, where they are to be located, and when they are to be filled, abolished, or vacated. The agency determines when there is a surplus of employees at a particular location in a particular kind of work. A surplus of employees in any part of an agency requires the agency to determine whether the employees will be assigned to vacant positions, be adversely affected for reasons

related to performance, or conduct or compete in reduction in force.

All the above are management responsibilities and the management determinations regarding these responsibilities are not ordinarily subject to review by the U. S. Civil Service Commission in a reduction-in-force appeal. As previously noted, however, it would be a valid and proper exercise of its management perogative for an agency, faced with the necessity for reducing its force, to select for abolishment those functions and/or positions that are least necessary to the accomplishment of, or making the least substantive contribution to, the agency's mission. Therefore, whether the detailing of the appellant from a position about to be abolished did or did not lower his relative posture within the agency, is irrelevant

with respect to the adjudication of his reduction-in-force appeal.

In effecting a reduction-in-force action, an agency must comply with the requirements of Part 351, Title 5, Code of Federal Regulations (5 CFR). The Civil Service Commission, pursuant to its appellate authority, reviews appeals from reduction-in-force actions to determine whether the appellant was properly within reach for release from the position to which officially assigned at the time of the reduction-in-force action, whether the notice of reduction-in-force action was timely and otherwise in accord with the notice requirements in the regulations, and, if the appellant was so entitled, whether a reasonable offer of assignment was made. The appellant's claims and the facts in his case have been evaluated in light of these requirements.

With respect to the appellant's contention that his competitive level was too narrow, we note that he identified a number of positions, occupied by employees with less retention standing at the time of the reduction in force, which he felt should have been placed in his competitive level. The following position numbers were specifically identified by the appellant:

11519	14153	13660
13659	13653	11872
13480	14227	12142
12261	13764	13132
15021	13689	11926
	11938	

The appellant also identified numerous supervisory positions which he felt should have been placed in his competitive level. However, because the appellant's position at the time of the action was non-supervisory, it could not, by its very nature, have been placed in the same competitive level with supervisory positions. The appellant was, however, afforded the opportunity to submit

additional representations to this office if he felt either that his position was supervisory or that one or more of the positions designated by the agency as being supervisory were not. No such representations have been received to date. Accordingly, no further consideration will be given to the supervisory positions identified by the appellant.

The competitive level issue set forth above was examined in light of Section 351.403, Title 5, Code of Federal Regulations (5 CFR 351.403) which sets forth the authority and responsibility of an agency to establish competitive levels. Under the provisions of the regulations, competitive levels are to consist of all positions which are so similar in all important respects that the agency can move an employee from one to another without significant training or without unduly interrupting the work program.

Although some positions possess such similarities that they outwardly appear to be interchangeable, nevertheless these positions must be assigned separate competitive levels if they vary by one or more important factors.

A determination as to whether positions are mutually interchangeable within the meaning the reduction-in-force regulations is made on the basis of the information contained in the official position descriptions rather than on the comparative qualifications of the incumbents of the positions in question. Under such circumstances, any significant difference in the duties, responsibilities, or qualifications requirements set forth in these position descriptions is sufficient to warrant separate competitive levels for the respective positions.

As part of our adjudication of this appeal, this office requested the agency's rationale

for placing the sixteen positions identified by the appellant in a separate competitive level from position number 11939. The agency provided their rationale by letter dated February 15, 1977. In addition, the agency also noted that if the rationale provided was not sufficient, then the position offered to the appellant, position number 11938, should also have been placed in his competitive level whereby his reassignment to that position would not have constituted a reduction in force. Accordingly, in requesting an advisory opinion, this office included position number 11938 even though the agency had not provided its rationale for also placing this position in a separate competitive level from position number 11939.

We referred the competitive level issue identified above to staffing specialists in the Commission's Atlanta Regional Office,

who, through training and experience, are competent to determine such issues for an advisory opinion. We were advised that the appellant's competitive level was properly established and that it should not have included the sixteen position numbers set forth above. In the absence of any rationale to the contrary, however, it was determined that position number 11938 should have been placed in the same competitive level as position number 11939. A copy of this advisory opinion dated March 28, 1977 is attached to this decision as Enclosure 1. Both parties were provided with a copy of the advisory opinion for their review and comments, and additional representations were submitted by both parties. Because of the additional material submitted, this office again referred the entire appeal file to the staffing specialists in order to determine whether the additional material

warranted a change in their previous advisory opinion. In an advisory opinion dated May 3, 1977 (Enclosure 2), the staffing specialists determined that with respect to the sixteen positions identified by the appellant, no change was warranted in their previous advisory opinion. However, in light of the material submitted by both parties, it was the opinion of the staffing specialists that position numbers 11939 and 11938 were properly placed in separate competitive levels. Based upon our review of the entire record, we adopt the staffing specialists' advisory opinions dated March 28 and May 3, 1977 as being dispositive of the competitive level issue raised in this case. While we note the appellant's contentions that this advisory opinion is inconsistent, unfounded, invalid, arbitrary, capricious, mischievous, and improper, and indicative of undue bias, we agree with the

staffing specialists that he has offered no substantive information which would alter the previous advisory opinion with respect to position number 11939 and the sixteen positions identified by him. Therefore, in view of the fact that the appellant's position was abolished, and in light of the fact that it was the only position in his competitive level, we conclude in the absence of any evidence to the contrary that the appellant was properly reached for release from his competitive level.

With respect to the appellant's contention that there was excessive restriction on competitive levels in the second round, we note that a competitive level determination has a bearing only upon the competition in the first round. The second round of competition refers to a determination as to whether the appellant had assignment rights to another position in another competitive

level. In this regard, we note the fact that the appellant was offered reassignment to position number 11938 [Aerospace Engineer (AST Flight Systems), GS-861-15]. Federal Personnel Manual Chapter 351, Subchapter 7-3c(3), states: "When there are two or more positions, all with the same representative rate, the agency must offer one of them, but which one is left entirely to agency discretion. Among positions with the same representative rate, the employee has no right to a choice; any one of them satisfies his right of assignment." In view of this provision, we find that the agency's offer to reassign the appellant to position number 11938 was a proper offer. Accordingly, even if the agency retained employees with lower retention rights than the appellant, this would have no bearing on his reduction-in-force rights.

The only remaining issue to be determined is the appellant's allegation that he was not qualified for assignment to the position which he was offered (position number 11938). With respect to this claim, the record reflects that the position offered to the appellant was in the same classification series (GS-861) as the position which he incumbered at the time of his resignation (position number 11939). 5 CFR 351.702 states that an agency may assign an employee in a reduction in force without regard to the Commission's standards and requirements for the position if: (a) he meets any minimum education requirements for the position; and (b) the agency determines that the employee has the capacity, adaptability, and special skills needed to satisfactorily perform the duties and responsibilities of the position. In view of the fact that the educational requirements of position number

11938 are the same as position number 11939 which the appellant occupied at the time of his resignation, a claim that he did not meet the Commission's minimum educational requirements would necessarily infer that he was not qualified for position number 11939. Accordingly, by letter dated August 25, 1976, this office afforded the appellant the opportunity to identify any minimum educational requirements which he did not have as of June 30, 1972. The appellant, however, was not able to identify any minimum educational requirements that he was lacking. In view of the fact that the determination that an employee has the capacity, adaptability, and special skills needed to satisfactorily perform the duties and responsibilities of the position is subjective and discretionary in nature, we find that it is not subject to review under the circumstances presented in this case.

Accordingly, we find no basis from which to conclude that the appellant was not qualified, within the meaning of the regulations, for assignment to position number 11938.

IV. CONCLUSION

Our review of the facts and circumstances relating to the issues raised disclosed no violation of the appellant's rights under reduction-in-force regulations.

V. DECISION

The reduction-in-force action is affirmed.

VI. FURTHER RIGHT OF APPEAL

Unless this decision is further appealed within fifteen calendar days of the day on which it is received, it becomes the final decision of the U. S. Civil Service Commission. Any further appeal of this decision must be sent directly to:

Appeals Review Board
U. S. Civil Service Commission
Washington, D. C. 20415

Two copies of the letter of further appeal and all represesentations which the Board should consider beyond those now in the appeal file must be submitted within the fifteen calendar day time limitation.

For the Commission:

/s/ Lyman C. Duncan, Jr.
LYMAN C. DUNCAN, JR.
Chief Appeals Officer

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

GEORGE A. KELLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
ROBERT E. HAMPTON, et al., Commissioners, United States Civil Service Commission,	)	CIVIL ACTION NO. 75-G-0846-NE
	)	
and	)	
	)	
WILLIAM P. BERZAK, et al., Members, Board of Appeals and Review, United States Civil Service Commission,	)	
	)	
Defendants.	)	

ORDER

In accordance with the findings of fact and conclusions of law entered contemporaneously herewith, it is ORDERED, ADJUDGED and DECREED that the defendants' motion for summary judgment be, and the same hereby is, DENIED, and the case is REMANDED

to the Civil Service Commission with instructions to take further testimony in the case, to respond to all of the issues raised by plaintiff, and to make additional findings on the issues which have not been responded to heretofore.

DONE and ORDERED this 22nd day of June 1976.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

GEORGE A. KELLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
ROBERT E. HAMPTON, et al., Commissioners, United States Civil Service Commission,	)	CIVIL ACTION NO. 75-G-0846-NE
	)	
and	)	
	)	
WILLIAM P. BERZAK, et al., Members, Board of Appeals and Review, United States Civil Service Commission,	)	
	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON MOTION FOR SUMMARY JUDGMENT

The defendants' motion for summary judgment was considered on briefs of counsel without oral argument. Jurisdiction and venue are not contested. The court has jurisdiction under 5 U.S.C. §§702, 704, 706.

FINDINGS OF FACT

On May 15, 1972, plaintiff George A. Keller was reached by a reduction-in-force (hereinafter cited as "RIF") at the George C. Marshall Space Flight Center. An offer of reassignment was made by the government, which offer was first accepted but subsequently rejected. Accordingly, separation was effected June 30, 1972. The plaintiff filed an apeal with the Director, Atlanta Region, U. S. Civil Service Commission, on July 17, 1972, in which he raised the following points:

1. Excessive restriction on competitive levels in the first round. (Reduction of the number of persons in each competitive level resulted in reducing the number of persons with whom to compete and thus allowed arbitrary selection for RIF.)

2. Excessive restriction on competitive levels in the second round.

3. Extended "Time Limited Assignment" (hereinafter cited as "TLA") in effect reduced appellant's competitive posture. (TLA is a temporary assignment to another job made while one is retained in the organizational structure of the original job. The plaintiff's contention is that by being absent from his "control organization" he was more likely to be selected for RIF than those persons who were presently working in the "control organization.")

4. Failure to make a reasonable offer of change of position. (The plaintiff alleges in effect that his education, training, and job experience qualify him as a general engineer and an engineering-manager. His terminal assignment was as an engineering project manager [Certified Record 83,84 (hereinafter cited as C.R.)]. Although it is not completely clear from the record, it appears

that the offered job was a highly technical aerospace engineering job [C.R. 87,88]. The plaintiff alleges that he was unqualified for the job which was offered and that therefore no job was offered.)

5. Retention of employees with lesser retention rights in jobs for which the appellant considers himself qualified (C.R. 72,73).

The findings of the Regional Appeals Examiner on September 19, 1972, (C.R. 59,60) denied the appeal. That decision appears to have met only the issues raised in points 3 and 4. With respect to point 3, the issue was found "not material or relevant." With respect to point 4, the opinion stated the following:

> When there are one or more positions having the same representative rate of pay, the agency may reassign an employee to any one of them; the employee has no right to choose his assignment. Further, the employee is entitled to only one offer. If he refuses, he may be separated.

The case was then appealed to the Civil Service Commission Board of Appeals and Review. A decision affirming the Regional Appeals Examiner was rendered on March 8, 1973. That decision stated in part:

> The Board has carefully considered the entire record in your case and finds that the decision of the Atlanta Regional Office responded to each of the issues raised. The Board's review of the decision further discloses that the Regional Office correctly decided each of those issues and was fully dispositive of each of the contentions made.

The decision further stated:

> ...[G]eneral allegations concerning the competitive level structure at the George C. Marshall Space Flight Center and the practice of making "Time Limited Assignments" are not material to your reduction-in-force appeal. It is not possible to resolve such issues on an individual basis and no specific evidence pertaining to either issue and its effect upon you individually was submitted. Furthermore, the Board notes that you received an offer of reassignment which you subsequently declined. One reasonable offer of assignment is

all that you are entitled to. (C.R. 2,3).

The plaintiff filed an action pro se in this court on June 30, 1975. He alleged that "[t]he appeal process appeared to have responded to items above numbered 1, 2, 3, and 5 either directly or indirectly in some fashion. Response, if any, to item numbered 4 appeared to be incompetent and void of comment on qualifications."

Defendants' answer filed November 21, 1975, claimed the defenses of laches and failure to state a claim for which relief can be granted. Defendants filed a motion for summary judgment on February 18, 1976. Briefs of both counsel were submitted on the motion. Defendant argued that the decision was based upon substantial evidence, that procedures effected by the agencies were consistent with appropriate regulations, and that the absence of issues of fact entitled defendants to a summary judgment. The

plaintiff argued in effect that all of his allegations were interrelated and that defendants had selectively ignored his arguments and improperly applied the law to that portion of his appeal which was addressed.

CONCLUSIONS OF LAW

1. Jurisdiction is based upon the Administrative Procedure Act, 5 U.S.C. §§702, 704, 706. Accordingly, the scope of review is narrow. In Harvey v. Nunlist, 499 F.2d 335, 336 (5th Cir. 1974), the court said:

> ...[T]he scope of judicial review of agency action is limited to discerning whether procedural due process requirements were met and whether the agency action was arbitrary or capricious or unsupported by substantial evidence ....

2. The plaintiff in his appeal raised five specific points. Failure of the administrative reviewers to respond to each of the issues raised is arbitrary action in

and of itself. Issues 1, 2, 4, and 5 were grouped together by the Regional Appeals Examiner and answered as follows:

> Our review of the records shows that you were offered assignment from one GS-15, AST, Flight Systems position to another GS-15, AST, Flight position; that you declined this offer; and that you were separated from the service.
>
> When there are one or more positions having the same representative rate of pay, the agency may reassign an employee to any one of them; the employee has no right to choose his assignment. Further, the employee is entitled to only one offer. If he refuses, he may be separated. (C.R. 59).

Although this answer to issues 1, 2, 4, and 5 may have been intended as a full answer to all of the issues, it is actually an answer only to issue 4. If the answer were legally correct it may have been dispositive of the issues. The legal effect of the answer to issue 4 will be discussed below. In any event, three of the five issues raised on appeal have not been

answered. Such action is arbitrary and clearly within the scope of review of this court. Appalachian Power Co. v. Environmental Protection Agency, 477 F.2d 495 (4th Cir. 1973). The Board of Appeals and Review affirmed the findings of the Regional Examiner and stated, "... [t]he decision of the Atlanta Regional Office responded to each of the issues raised." (C.R. 2). Such a decision is equally arbitrary, for there was no response to issues 1, 2 and 5.

3. The plaintiff's issue 4 raised the question of whether plaintiff was qualified for the job offered him in lieu of separation. The defendants at all levels of appeal totally ignored the question of qualifications. The plaintiff has urged on appeal and in his complaint the following:

> On the surface of things, Plaintiff was separated from a position of Aerospace Engineer GS-861-15, having been offered and having declined reassignment to

just another, or essentially equivalent, GS-681-15 position.

In reality Plaintiff was offered a position for which he was not qualified, at least not qualified without further training. Pertinent qualification requirements were explicit and prescribed within the Federal Personnel Manual promulgated by the United States Civil Service Commission and applicable in this case. Subchapter 7 thereto, titled Assignment Rights, Paragraph 7-7, provided in part that 'An agency may not waive a minimum education requirement prescribed by the Commission' and that 'When an employee's qualifications for a position is an issue in his appeal, the Commission applies its regular qualification standards.'

Clearly the reassignment required educational qualifications in aeronautical engineering and highly specialized skills in structural analyses, computer science, and dynamics associated with launch vehicles, spacecraft and scientific payloads. Independent review and evaluation of technical work in these fields by major aerospace contractors and scientific investigators, as required by the assignment, would have demanded exceptional skills and proficiencies. This must have been the official view of the employing agency inasmuch as the basic position has been classed in

> a single-person competitive level for the previous incumbent. [Complaint 2,3]
>
> ...
>
> Plaintiff's prior background in federal service included Ordnance Engineering and General Engineering classifications but not Aeronautical Engineering; his graduate studies were in electrical engineering and physics. This was evident in personnel records which were readily available to Defendants. ... All this employment was dedicated to either project or management office operations where concomitant technical responsibilities were vested in organizationally separate line divisions. This employment history, also, was readily available to Defendants. [Complaint p.4]

The defendants answered this contention, using the Federal Personnel Manual, chapter 351-29, subchapter 7-1,2, and the case of Barger v. United States, 170 Ct. Cl. 207 (1965). In their brief the defendants cite Federal Personnel Manual, chapter 351-29, subchapter 7-1,2:

> When an agency selects a competing employee for release from his competitive level in the competitive service, it must do one of three things: assign him with his consent to a position he qualifies for and which will last at least three months, furlough him, or separate him. Whether the agency offers an assignment in accordance with his rights or offers administrative assignment, the employee may refuse the offer. When he refuses an offer which is in accord with his rights, the agency may separate or furlough him by reduction in force. (Subchapter 7-1)
>
> ...[W]hen the position exists and the released employee qualifies for it, the agency must offer him that position or something at least as good. ... When the agency can satisfy the employee's right to assignment by offering him any of two or more positions with the same representative rate, it may offer whichever one it chooses. The employee has no right to choose the assignment. (Subchapter 7-2)

The defendants' brief cites Barger as authority for the proposition that a change is reasonable if it involves the same representative rate of pay. Defendants further state, "... Barger makes it clear

that the GS-15 position was reasonable, because it involves the same grade and pay." (D. brief 5). Such a reading of Barger is unfounded.

Barger involved a female civil service employee, GS-10, Employee Utilization Officer. After 11 years, 9 months, and 15 days of service she was reached by a RIF and offered a reassignment to the position of Placement Assistant (Typing), GS-5. She accepted the position, but the offer was shortly withdrawn. She was then offered a position as Supervisory Clerical Assistant (Medical), GS-5, which she rejected, stating that it was not the best possible offer and that she was not qualified to perform its statistical and medical functions. She was accordingly separated. Eventually she was rehired as a GS-11, Management Analyst. In her suit she alleged that her nonveteran retention preference rights had been

violated because a position of Management Analyst, GS-9, had been filled by a new appointment without offering the job to her. Eventually the Civil Service Commission ruled that she did not meet the qualifications for either the GS-9 or GS-11 position at the time of the RIF action and was thus not entitled to an offer. The Commission also granted a waiver of qualifications so that she might remain employed at her newly gained GS-11 position.

Barger cites pertinent Civil Service Regulations which have been cited in both briefs in this case. The government places great emphasis on the section which states that "... a change is reasonable if it involves the same representative rate of pay," while seemingly ignoring the section which states that "... an employee is entitled to a reasonable change in position if qualified [emphasis added] as against an

incumbent in the competitive area with lower retention standing." 170 Ct. Cl. at 212. The key to Barger is that plaintiff, a GS-10, was offered reassignment as a GS-5 not because the change involved the same representative rate of pay, but because she was not qualified for the other positions available.

It is ludicrous to cite Barger for the proposition that an offer is reasonable per se if it involves a representative rate of pay. A representative rate of pay is one indication of a reasonable job offer. It is not the only criterion; the person must be qualified for the job offered. While broader criteria may have in fact been applied, there is no mention at any level of review in the case of George Keller of any criteria being applied other than that of equal pay rate. This failure is present despite Keller's repeated protests that he

was not educationally qualified (P. brief 4,5). In Barger the plaintiff was not entitled to reassignment following a RIF to a job for which she was unqualified. It is difficult to see how the plaintiff in this case can be required upon penalty of separation to take a job for which he is allegedly unqualified.

Although the plaintiff concedes that he has no right to choose his assignment, he has consistently contended that he did not meet the educational requirements for the new job. He points out that the government may waive all qualification standards except minimum education requirements prescribed by the Commission (Federal Personnel Manual, ch. 351-33, subch. 7). No response to this issue has ever been made. The government at all levels has sidestepped the issue either by failing to respond, or by applying code word standards such as "same representative

rate of pay." As a result, plaintiff has been denied due process of law.

4. The plaintiff's issue 3 raised the question of whether the use of TLA's increased the likelihood of being reached by RIF. The response to this issue was a statement that the issue was not material or relevant (C.R. 59,60). The plaintiff indicated on his original appeal (C.R. 21) that a TLA virtualy assured selection for RIF:

> Upon return to the parent organization the appellant was informed by the Deputy Director thereof that his return created a problem inasmuch as he had "departed as a member of an organization and was returning as an individual" and "there was no room on the Technical Staff for another person at the GS-15 level," the laboratory faced with pending reductions at the time. (C.R. 21).

An examination of the TLA memorandum to George Keller dated April 14, 1969, (C.R. 39,40) reveals the terms of the assignment

in paragraph 5. Paragraph 6 delineates the responsibilities of the losing and gaining organizations. The responsibilities of the losing organization appear to require sufficient supervision to preclude allowing disruption of career opportunities. The plaintiff's point is that in helping the defendant by agreeing to a series of temporary assignments in vital areas, he had his job security placed in jeopardy.

While the use of TLA as it relates to RIF may warrant further examination, it is not necessary for a resolution of this case. This is so, not because the point is not relevant or material to the issues presented, but because the issue is inextricably interrelated with issues 1 and 2, and thus with the entire group of issues presented by the plaintiff.

In issues 1 and 2, plaintiff alleged that the use of one- and two-man competitive

levels reduced merit competition and increased the likelihood of arbitrary selection of persons for RIF. The defendants state:

> ... Under 5 C.F.R. §351.403, agencies have the right to set up competitive levels which are to consist of positions which are so similar in all important respects that an employee can move from one to the other without retraining and without undue interference with the agency's mission. ...
>
> It is clear that the agency has the authority to set up one-man competitive levels, 5 C.F.R. §351.403, so long as no similar positions are sufficiently alike (and their occupants have greater retention points than plaintiff).

(D. brief, 5,6).

The interrelationship of issues 1, 2, and 3 is clear. Defendants contend that the government has the right to properly classify employees in small competitive levels according to expertise and to organize them under a structure favorable to government efficiency. Assuming, while not

deciding, that all proper procedures were followed in these respects, this court agrees that the government may organize its personnel according to such a plan. If this is so, however, the importance of these issues in the plaintiff's claim becomes clear. The defendants have been placed in the position of arguing inconsistent positions and yet deny the presence of any inconsistencies. In points 1 and 2, the defendants maintain that many jobs at the space center are so highly specialized that these jobs must be classified as one- or two-man competitive levels. In point 3, the defendants argue that the technical requirements of the space center demand that a system of organization such as TLA be imposed in order to take full advantage of the technical expertise of its personnel. After asserting that these highly technical jobs require a very specialized personnel

structure in issues, 1, 2, and 3, the defendants proceed to argue that the plaintiff must take any job offered if it involves the same representative rate of pay. The defendants thus say they are permitted to restrict competition in terms of RIF because very few jobs are technically similar, and yet that they may offer any technical job if it involves representative pay. Such a position is illogical.

5. In point 5 plaintiff alleges that employees with lesser retention rights were retained in jobs for which appellant considered himself qualified. This court may not decide whether plaintiff was in fact qualified for the job he was offered or for the lesser jobs for which he seeks consideration. If, however, plaintiff sustains his case factually, 5 U.S.C. §3502, then Barger would appear to require the defendants to search for another position

for plaintiff, giving due consideration to his retention rights.

6. Defendants have raised the defense of laches in their motion. The defense of laches is limited to cases in which the defendant has been prejudiced, but the defendants have made no allegations of prejudice in this case.

A multitude of cases can be found which find or fail to find laches. The result is dependent upon the facts of the case. Wilmot v. United States, 205 Ct. Cl. 666 (1974), presents a fact situation very similar to Barger and to the case at bar. In Wilmot, the delay in filing was 39 months. Despite the fact that plaintiff failed to show arbitrary action on the part of the government, the court did not find laches:

> Although plaintiff was inexplicably tardy in bringing suit, one thing that shines through the maze of dates, contentions, argument, and 86 exhibits in this case, is plaintiff's persistent, vigorous

> pursuit of administrative appeal to all available levels of the Civil Service Commission which, in turn, considered and reconsidered plaintiff's contentions. ... 205 Ct. Cl. at 685,686.

The volume of letters, exhibits, and briefs in this case appears to rival those in Wilmot. A denial of the defense of laches is certainly a supportable discretionary decision by this court.

CONCLUSION

Having considered the entire record and the briefs of both parties, the court is convinced that the plaintiff has been subjected to arbitrary action and has been denied due process of law. The failure to respond to all of the issues presented on appeal was arbitrary. The imposition of an improper legal standard based upon Barger was a denial of due process. The failure to consider other issues because of this improperly applied standard also denied plaintiff due process.

While the plaintiff was slow to seek judicial relief, the record discloses repeated attempts to convince the defendants at all levels of appeal of the soundness of his position. The crux of the plaintiff's case is his claim that the defendants have improperly read and applied Barger. This court agrees that Barger was misread and that an improper standard was applied. As a result, all of the issues presented, because of their interrelationship, must be considered and answered individually and in terms of the case as a whole. Plaintiff, of course, must prove factually that he is entitled to the protection of the standards discussed herein. He is, however, entitled to a chance to offer that proof.

Judgment will be entered accordingly.

DONE this 22nd day of June 1976.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

BAR:bjn
March 8, 1973

Mr. George A. Keller
7702 Chadwell Road
Huntsville, Alabama 35802

Dear Mr. Keller:

This is in further reference to your appeal to the Board of Appeals and Review from a decision of the Commission's Atlanta Regional Office sustaining your agency, the George C. Marshall Space Flight Center, Alabama, which by application of reduction-in-force procedures separated you from your position of Aerospace Engineer, GS-861-15 effective June 30, 1972. On May 15, 1972, you were offered reassignment to another GS-861-15 position but declined to accept this offer on June 30, 1972 and were separated on that date.

It is noted that your appeal to the Board is contained in three different communications dated October 10, 1972, December 16, 1972

and January 19, 1973. The correspondence resulted in a determination that you did not desire that the Board remand your case to the Regional Office in order that you might make a personal appearance.

Your contentions on appeal to the Board of Appeals and Review are the same as those raised in your initial letter of appeal to the Regional Office. The Board has carefully considered the entire record in your case and finds that the decision of the Atlanta Regional Office responded to each of the issues raised. The Board's review of the decision further discloses that the Regional Office correctly decided each of those issues and was fully dispositive of each of the contentions made.

The Board notes that general allegations concerning the competitive level structure at the George C. Marshall Space Flight Center and the practice in making

"Time-Limited-Assignments" are not material to your reduction-in-force appeal. It is not possible to resolve such issues on an individual basis and no specific evidence pertaining to either issue and its effect upon you individually was submitted. Furthermore, the Board notes that you received an offer of reassignment which you subsequently declined. One reasonable offer of assignment is all that you are entitled to. Federal Personnel Manual Chapter 351, Subchapter 7-(3)d states "An employee is entitled to only one proper offer. He is entitled to no further offer when: --He rejects the offer." The Board of Appeals and Review finding no violation of your reduction-in-force rights hereby affirms the decision of the Atlanta Regional Office. Section 772.307(c) of the Civil Service Regulations provides that decisions of the Board of Appeals and Review are final and

there is no further right of administrative appeal.

For the Commissioners:

Sincerely yours,

William P. Berzak
Chairman

cc: Director
Attention: Chief Personnel Office
George C. Marshall Space Flight Center
National Aeronautics and Space Administration
Marshal Space Flight Center,
Alabama 35812

cc: Atlanta Regional Office

cc: Director of Personnel
Code BP
National Aeronautics and Space Administration
Washington, D. C. 20546

September 19, 1972
Appl:LET:hg

Mr. George A. Keller
7702 Chadwell Road, S. W.
Huntsville, Alabama 35802

Dear Mr. Keller:

This refers to your appeal regarding your reassignment as a result of reduction-in-force action at Marshall Space Flight Center, Alabama.

Our findings with regard to the issues you raised are as follows:

You claimed that your competitive level and second round competition were excessively restricted; that the agency failed to make a reasonable offer of change of position; that employees with less retention rights than you were retained in positions for which you feel qualified.

Our review of the records shows that you were offered assignment from one GS-15, AST, Flight Systems position to another GS-15, AST, Flight position; that you declined this offer; and that you were separated from the service. When there are one or more positions having the same representative rate of pay, the agency may reassign an employee to any one of them; the employee has no right to choose his assignment. Further, the employee is entitled to only one offer. If he refuses, he may be separated.

Your contention with regard to "Time Limited Assignments" restricting your competitive posture is not material or

relevant in a reduction-in-force appeal.

Since our review of the facts and circumstances relating to the issues you raised disclosed no violation of your rights under the Retention Preference Regulations, your appeal is denied.

Unless this decision is further appealed within 15 calendar days of the day on which it is received, it becomes the final decision of the U. S. Civil Service Commission. Any further appeal of this decision must be sent directly to:

Board of Appeals and Review
U. S. Civil Service Commission
Washington, D. C. 20415

Two copies of the letter of further appeal and all representations which the Board should consider beyond those now in the appeal file must be submitted within the 15 calendar day time limitation.

For the Regional Director:

Sincerely,

LYMAN C. DUNCAN, JR.
Regional Appeals
Examiner

cc:
Director
Attn.: Chief, Personnel Office
George C. Marshall Space Flight Center
National Aeronautics and Space
Administration
Marshall Space Flight Center,
Alabama 35812

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

GEORGE A. KELLER,
Appellant,

v. No. 85-729

THE UNITED STATES,
Appellee.

O R D E R

A petition for rehearing and a suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing in banc is declined.

FOR THE COURT

/s/ George E. Hutchinson
George E. Hutchinson, Clerk

August 1, 1985
Date

cc: James H. Richardson
Kathleen A. Flynn

July 14, 1972

Director, Atlanta Region,
U. S. Civil Service Commission
Atlanta Merchandise Mart
240 Peachtree Street N.W.
Atlanta, Georgia 30303

Dear Sir:

This letter constitutes an appeal against certain actions taken during the recent reduction in force (RIF) at the George C. Marshall Space Flight Center (MSFC), Huntsville, Alabama, and against certain guidelines, procedures, practices, and conditions relevant thereto. At the time this RIF was initiated, the undersigned appellant was serving in a position as AST, Flight Systems, Series 861, Grade 15, Astronautics Laboratory, Science & Engineering, George C. Marshall Space Flight Center, National Aeronautics and Space Administration.

Notice of the particular RIF action and reassignment offered, along with other

specifics including preference information, is contained in letter A&TS-MA-DIR dated May 15, 1972, addressed to the undersigned, a copy of which is provided as enclosure 1. Copies of the blank acceptance/non-acceptance letter of reply and Position Record numbered 11938 are included with the basic notice as received.

The offer of reassignment was accepted as shown by copy of the letter of acceptance, enclosure 2. Subsequently, assignments, to become effective June 30, 1972, were received June 27, 1972, by letter S&E-ASTN-DIR (72-270) dated June 26, 1972, enclosure 3.

Following clarification of requirements imposed by a temporary restraining order issued by the U. S. District Court of Washington, D.C., declination of the reassignment was submitted and separation

was effected June 30, 1972. Please see enclosures 4 and 5.

This appeal is based, at this time, on the following grounds:

1. Excessive restriction on competitive levels. Competitive levels at MSFC are restricted, at the GS-15 grade level, to one or a few employees more often than otherwise. This obviates normal first-round competition, facilitates manipulation of selection processes for retention or separation of individuals, and reflects what appears in effect as administrative conspiracy against the rights of employees. In the present case, competitive levels for both the abolished position and the reassignment position were each occupied by a single employee.

2. Excessive restrictions on competitions in second round.

3. Extended "Time Limited Assignment", in effect reduced the appellant's competitive posture. During the period from April 1969 through August 1971, appellant was assigned on the so-called time-limited-assignment for a task that was known at the outset to require at least two years. Implementation of these fairly-common assignments has been generally unsatisfactory from a point of view of the employee involved, at least in terms of his competitive posture within the competitive area.

4. Failure to make reasonable offer of change of position. Personnel records of the appellant show qualifications and eligibilities as General Engineer, GS-15 and Aerospace Technologist, GS-15 and certification under the Federal Administrative and Management Examination, GS-15. Qualifications and experience are not shown for " . . . . . aerodynamics

design and testing efforts . . . . " as stated in the Position Record for the reassignment offered nor for the highly specialized expertise required for performance under the assignments, enclosure 3, especially without opportunity for further education and training. It should be noted that the 'independent assessment' required was to be independent in comparison to the work of established division-level elements, currently operating within the same specialties, as well as to the work of highly competent industrial organizations. While the assignment appeared interesting and indeed challenging, it also appeared as a professional pitfall.

5. Retention of employees with lesser retention rights in jobs for which the appellant considers himself qualified.

Additional information can be furnished to amplify the above, and an opportunity to

expand this appeal may become desirable. If an informal meeting is desired, a mutually convenient time and place can likely be readily agreed to.

Very truly yours,

/s/ George Keller
George Keller

Keller, George Adam
7702 Chadwell Road S.W.
Huntsville, Alabama 35802
Tel: (205) 881-5674

Enclosures
1. A&TS-MA-DIR ltr to appellant dated 5/15/72 w/encls.
2. Ltr of acceptance dated 5/18/72.
3. S&E-ASTN-DIR(72-270) ltr of assignment dated 6/26/72.
4. DEP-M ltr to appellant dated 6/29/72 w/endorsements.
5. Ltr of declination of reassignment.

7/14/72

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
GEORGE C. MARSHALL SPACE FLIGHT CENTER
MARSHALL SPACE FLIGHT CENTER, ALABAMA 35812

REPLY TO
ATTN OF: DEP-M June 29, 1972

TO: S & E - ASTN/George A. Keller

FROM: DEP-M/R. W. Cook

SUBJECT: Suspension of Reduction in Force Notice

As a result of the Temporary Restraining Order issued by the U.S. District Court of the District of Columbia, the reduction in force notice issued to you on May 15, 1972, is hereby amended. The original notice gave June 29, 1972, as the effective date of the reduction in force.

This amendment postpones the effective date of your individual reduction in force action. The time limit for you to appeal the reduction in force action, stated in the notice of May 15, 1972, to the Civil Service Commission, is not extended by this

postponement. If you have not already appealed to the Civil Service Commision and wish to do so, you must file your appeal with the Director of the Commission's Atlanta Region, not later than July 14, 1972.

The address is:

Mr. Hammond B. Smith
Regional Director, Atlanta Division
U. S. Civil Service Commission
240 Peachtree Street, N.W.
Atlanta, Georgia 30303

Should you nevertheless desire to have your separation processed (whether through retirement or otherwise) you may formally request that you not be considered within the class of employees covered by the Temporary Restraining Order issued by the Court (Civil Action No. 128372). In such an event, your separation will be effective on June ~~29~~ 30, 1972.

/s/ R. W. Cook
R. W. Cook
Deputy Director, Management

I hereby acknowledge receipt of the original of this letter.

/s/ G. A. Keller — 6/30/72
Signature — Date

Pursuant to the above letter, I hereby request that I not be considered within the class of emplyees covered by the Court's Temporary Restraining Order (Civil Action No. 128372). I specifically request that my separation be processed as of this date.

/s/ G. A. Keller — 6/30/72
Signature — Date

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
GEORGE C. MARSHALL SPACE FLIGHT CENTER
MARSHALL SPACE FLIGHT CENTER, ALABAMA 35812

REPLY TO
ATTN OF: A&TS-MA-DIR

TO: A&TS-MA-DIR/Paul L. Styles

FROM: G. A. Keller S & E - ASTN -DIR
(Name)

SUBJECT: Reduction-In-Force (Offer of Assignment)

I will /__/ will not /x/ accept the position offered. I understand that if I decline this offer, I will be separated from the Federal Service.

/s/ G. A. Keller
(Signature and Grade)

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
GEORGE C. MARSHALL SPACE FLIGHT CENTER
MARSHALL SPACE FLIGHT CENTER, ALABAMA 35812

REPLY TO
ATTN OF: A&TS-MA-DIR May 18, 1972

TO: A&TS-MA-DIR/Paul L. Styles

FROM: G.A. Keller Astronautics Laboratory
(Name) (Organization)

SUBJECT: Reduction-In-Force (Offer of Assignment)

/X/ I will accept the position of AST, Flight Systems, GS-861-15, position number 11938, in lieu of separation by reduction-in-force. I am aware that the duties and responsibilities of this position may require travel by air, and I agree to perform any required travel by commercial and/or government owned aircraft.

/__/ I will not accept the position offered to me in lieu of separation by reduction-in-force.

/s/ G. A. Keller
(Signature and Grade)

NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION
GEORGE C. MARSHALL SPACE FLIGHT CENTER
MARSHALL SPACE FLIGHT CENTER, ALABAMA 35812

REPLY TO
ATTN OF: A&TS-MA-DIR May 15, 1972

George A. Keller
S&E, Astronautics Laboratory
George C. Marshall Space Flight Center
Marshall Space Flight Center, Alabama

Dear Mr. Keller:

As has been stated on previous occasions, a reduction of permanent civil service positions at this Center is necessary during this fiscal year. This is part of an overall objective to achieve the proper size, composition, and organization of NASA's institutional base.

The retention rights of all employees concerned have been very carefully checked, and it is found that you have been reached for reduction-in-force action, which will result in your:

/_/ Separation, effective June 29, 1972.

/X/ Reassignment to AST, Flight Systems
(Title)

861 15/8 $31,554 Per Annum
(Series) (Grade) (Salary)

S&E, Astronautics Laboratory 11938
(Organization) (Pos. Nr.)

effective June 30, 1972.

/__/ Change to lower grade to _____
(Title)

_____
(Series) (Grade) (Salary)

_____
(Organization)

effective June 30, 1972.

The following preference information is furnished to you:

1. Your competitive area is Huntsville, Ala.

2. Your competitive level is 15-366.

3. Your retention subgroup is 1-A.

4. Your service computation date is 7-5-41.

5. You officially serve in a position as AST, Flight Systems Series 861 Grade, Step and Salary 15/8, $31,554 Per annum Organization S&E, Astronautics Laboratory

The offer of reassignment or change to lower grade is in lieu of separation, reduction-in-force. You should indicate your acceptance or declination of this offer by signing in the appropriate space in the attached memorandum and returning to this office no later than three calendar days after receipt of this letter. Your failure to accept within this time limit will be considered as a declination, and you will be separated by reduction-in-force, effective June 29, 1972.

If you are changed to lower grade in lieu of separation:

/_/ Salary retention provisions do not apply since your pay is being adjusted to a higher rate.

/_/ You are entitled to salary retention and will continue to receive your current rate of pay for two years following your change to lower grade.

/_/ You are entitled to salary retention. However, since you are being demoted more than three grades, your rate of

pay will be $_____ per annum for two years following your change to lower grade.

/__/ You are not entitled to salary retention because _____ _____.

A retained rate may be terminated earlier than the two-year period if you leave the agency, or if you should be further demoted at your request, for personal cause, or because of reduction-in-force.

You are entitled to appeal this determination that you are not eligible for salary retention benefits. You may appeal at any time after the date of this notice but not later than 15 calendar days after the effective date of your change to lower grade. Such an appeal may be made to the Atlanta Region, U.S. Civil Service Commission, Atlanta Merchandise Mart, 240 Peachtree Street, N.W., Atlanta, Georgia 30303.

This appeal must be in writing and should give the basis for the appeal. If you believe that an error has been made and/or you wish to examine the retention register and regulations which have a bearing on your case, you may contact your Personnel Management Specialist in the Manpower Office, second floor of Building 4202.

You will continue in a work status in your current position through June 29, 1972. If you are separated, you will be paid a lump sum for annual leave up to a maximum of 30 days, or the amount that was creditable to you at the beginning of the current leave year, whichever is greater.

This reduction-in-force is being made in conformance with Civil Service rules and regulations. You may appeal this action to the Atlanta Region, U. S. Civil Service Commission, Atlanta Merchandise Mart, 240

Peachtree Street, N.W., Atlanta, Georgia 30303.

This appeal must be in writing and made at any time after receipt of this notice, but not later than 15 calendar days after the effective date of your reassignment, change to lower grade, or separation, as the case may be. Your appeal should set forth your reasons for contesting this action, with offer of proof and such pertinent documents as you are able to submit.

Sincerely,

/s/ Paul L. Styles
Paul L. Styles
Director, Manpower Office

Constitution of the United States of America
Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C.
§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that-

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter-

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include-

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and

"agency action" have the meanings given them by section 551 of this title.

5 U.S.C.
§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other that money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C.
§ 703. Form and venue proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C.
§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative for an appeal to superior agency authority.

5 U.S.C.
§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C.
§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C.
§ 3502. Order of retention

(a) The Civil Service Commission shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to-

(1) tenure of employment;

(2) military preference, subject to section 3501(a)(3) of this title;

(3) length of service; and

(4) efficiency or performance ratings.

In computing length of service, a competing employee-

(A) who is not a retired member of a uniformed service is entitled to credit for the total length of time in active service in the armed forces;

(B) who is a retired member of a uniformed service is entitled to credit for-

(i) the length of time in active service in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

(ii) the total length of time in active service in the armed forces if he is included under section 3501(a)(3)(A), (B), or (C) of this title; and

(C) who is an employee in or under the Department of Agriculture is entitled to credit for service rendered as an employee of a county committee established pursuant to section 590h(b) of title 16, or of a committee or an association of producers described in section 610(b) of title 7.

(b) A preference eligible employee whose efficiency or performance rating is "good" or "satisfactory" or better than "good" or

"satisfactory" is entitled to be retained in preference to other competing employees. A preference eligible employee whose efficiency or performance rating is below "good" or "satisfactory" is entitled to be retained in preference to competing nonpreference employees who have equal or lower efficiency or performance ratings.

5 U.S.C.
§5596 Back pay due to unjustified personnel action

(a) For the purpose of this section, "agency" means--

(1) an Executive agency;
(2) the Administrative Office of the United States Courts;
(3) the Library of Congress;
(4) the Government Printing Office; and
(5) the government of the District of Columbia.

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and
(2) for all purposes, is deemed to have performed service for the agency during that period except that--

(A) annual leave restored under this paragraph which is in excess of the

maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Civil Service Commission, and (B) annual leave credited under subparagraph (A) of this paragraph but unused and still available to the employee under regulations prescribed by the Commission shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

(c) The Civil Service Commission shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees.

5 U.S.C.
§7512 Cause; procedure; exception

(a) An agency may take adverse action against a preference eligible employee, or debar him for future appointment, only for such cause as will promote the efficiency of the service.

(b) A preference eligible employee against whom adverse action is proposed is entitled to--

(1) at least 30 days' advance written notice, except when there is reasonable cause to believe him guilty of a crime for which a sentence of imprisonment can be imposed, stating any and all reasons, specifically and in detail, for the proposed action;

(2) a reasonable time for answering the notice personally and in writing and for furnishing affidavits in support of the answer; and

(3) a notice of an adverse decision.

(c) This section does not apply to the suspension or removal of a preference eligible employee under section 7532 of this title.

5 U.S.C.
§7701 Appeals of preference eligibles

A preference eligible employee as defined by section 7511 of this title is entitled to appeal to the Civil Service Commission from an adverse decision under section 7512 of this title of an administrative authority so acting. The employee shall submit the appeal in writing within a reasonable time after receipt of notice of the adverse decision, and is entitled to appear personally or through a representative under regulations prescribed by the Commission. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority and shall send copies of the findings and recommendations to the appellant or his representative. The administrative authority shall take the corrective action that the Commission finally recommends.

5 U.S.C.
§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the Court of Claims or a United States court of appeals as provided in chapters 91 and 158, respectively, of title 28. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1974 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provisions of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received

notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Claims or a United States court of appeals, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be-

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the District of Columbia if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board

shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

5 U.S.C.
§ 8336. Immediate retirement

(a) An employee who is separated from the service after becoming 55 years of age and completing 30 years of service is entitled to an annuity.

(b) An employee who is separated from the service after becoming 60 years of age and completing 20 years of service is entitled to an annuity.

(c) The head of the employing agency is to recommend, and the Civil Service Commission to approve, the retirement of an otherwise eligible employee requiring the agency and the Commission to consider the degree of hazard the employee was subjected to in the performance of his duties, and defining the term "detention" as used in the description the activities of qualifying employees.

(d) An employee who is separated from the service involuntarily, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service or after becoming 50 years of age and completing 20 years of service, is entitled to a reduced annuity.

(e) An employee who is voluntarily or involuntarily separated from the service, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service as an air traffic controller or after becoming 50 years of age and completing 20 years of service as an air traffic controller, is entitled to an annuity.

(f) An employee who is separated from the service after becoming 62 years of age and completing 5 years of service is entitled to an annuity.

(g) A Member who is separated from the service after becoming 62 years of age and completing 5 years of civilian service or after becoming 60 years of age and completing 10 years of Member service is entitled to an annuity. A Member who is separated from the service after becoming 55 years of age (but before becoming 60 years of age) and completing 30 years of service is entitled to a reduced annuity. A Member who is separated from the service, except by resignation or expulsion, after completing 25 years of service or after becoming 50 years of age and (1) completing 20 years of service or (2) serving in 9 Congresses is entitled to a reduced annuity.

(h) An annuity or reduced annuity authorized by this section is computed under section 8339 of this title.[1]

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[1]Petitioner recognizes that the 1972 edition of this statute controlled his July 3, 1972 application for discontinued service annuity. Subsequent amendments to this statute resulted in changes in its verbiage which petitioner has attempted to reconstruct from the Historical and Revision Notes to 5 U.S.C.A. §8336, as the 1972 version is lost to him or otherwise unavailable.

28 U.S.C.
§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

The Court of Claims shall have juridiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended,

with respect to suits by or against the Authority.

XI. Certificate of Service and Filing.

I, James H. Richardson of Huntsville, Alabama, a member of the Bar of this Court, do hereby certify, under penalty of perjury, that on this 30th day of October, 1985, I caused to be placed in the United States Mail (first-class postage prepaid) Petitioner's "PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT" and "PETITIONER'S APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT" as follows:

A. Three copies of both documents were addressed to each of the following:

1. Solicitor General
   United States Department
   of Justice
   Washington, D.C. 20530

2. Kathleen A. Flynn, Attorney
   Commercial Litigation Branch

Civil Division
Department of Justice
Washington, D.C. 20530

B. Forty copies of both documents were addressed as follows, for filing within the permitted time under Rule 28, Supreme Court Rules:

1. Honorable Joseph Spaniol, Clerk
The Supreme Court of the
United States
1 First Street, N.E.
Washington, D.C. 20543

James H. Richardson

James H. Richardson

STATE OF ALABAMA

COUNTY OF MADISON

The foregoing Certificate of Service and Filing was sworn to and subscribed before me this 30th day of October, 1985.

Susan M. Campbell
Notary Public
My commission expires:
9-20-87

Supreme Court, U.S.
FILED
DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-748

In the Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE A. KELLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

12 pp

BEST AVAILABLE COPY

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-748

GEORGE A. KELLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDU[illegible]M FOR THE UNITED STATES [illegible]N OPPOSITION

Petitioner, a former employee of the National Aeronautics and Space Administration (NASA), argues that the courts below erred in dismissing his suit for reinstatement and back pay on the ground that he had voluntarily retired and received retirement benefits.

1. a. In 1972, petitioner was employed as an aerospace engineer at Marshall Space Flight Center in Huntsville, Alabama, when, as part of a major reduction-in-force, his position was abolished. NASA offered petitioner reassignment to another position as an aerospace engineer, a position commensurate in

grade and similar in responsibility to his former position. Petitioner initially accepted the reassignment, but, after receiving a memorandum describing his first assignment in the new position, petitioner elected to discontinue service and to apply for retirement benefits. Petitioner's separation from service became effective June 30, 1972. He then applied for and was granted an immediate retirement annuity. Pet. App. 24-26.

b. Petitioner appealed his separation to the Civil Service Commission.[1] He made five arguments, including a claim that NASA was required to offer him a new position but had not done so because he was not qualified for the aerospace engineer position he was offered. The Commission rejected petitioner's claims. Following exhaustion of his administrative remedies, petitioner commenced this action for reinstatement and back pay in the United States District Court for the Northern District of Alabama, alleging that the Commission's decision was arbitrary and unsupported by the evidence. The district court remanded the case to the Commission in 1976 for additional findings because the administrative decisions had not adequately responded to petitioner's claim that he was not qualified for the aerospace engineer position and had not responded at all to some of his other claims. Upon remand, the Commission again denied petitioner relief. Pet. App. 137-139, 158.

Petitioner again sought review in the district court, which reversed the Commission's decision in 1981. The court held that the Commission's decision that

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[1] Pursuant to the Civil Service Reform Act of 1978, the Civil Service Commission was reorganized as the Merit Systems Protection Board and the Office of Personnel Management. Pub. L. No. 95-454, 92 Stat. 1111 *et seq.*

petitioner was qualified for the aerospace engineer position was not supported by substantial evidence. Alternatively, it reversed the administrative decision as a sanction "to punish the administrative agency for its failure to respond, as ordered by this court, to all of the issues raised" by petitioner. The court ordered petitioner reinstated with back pay. Pet. App. 76-77.

The government appealed the district court's decision to the Eleventh Circuit arguing, inter alia, that because the back pay award sought by petitioner exceeded $10,000, the United States Claims Court had exclusive jurisdiction to adjudicate the claim. See 28 U.S.C. 1346(a)(2), 1491. The Eleventh Circuit agreed and, accordingly, transferred the case to the Claims Court. Pet. App. 44-55.

c. Petitioner then filed his complaint in the Claims Court, again alleging that the reduction-in-force action violated applicable regulations because he was improperly offered a position for which he was not qualified. The government moved for dismissal on the ground that petitioner was barred from seeking reinstatement and back pay because he had retired voluntarily and received a retirement annuity. The Claims Court found that petitioner's claim was governed by *Brown* v. *United States*, 2 Cl. Ct. 586, 587 (1983), aff'd, 732 F.2d 167 (Fed. Cir. 1984) (Table), which held that where an employee has accepted retirement, he is precluded from seeking reinstatement and back pay. The only exceptions to the rule stated in *Brown* "are where the retirement was involuntary because it was obtained by coercion or because the employee was affirmatively misled as to the effect of accepting retirement" (2 Cl. Ct. at 587). The Claims Court concluded that petitioner had voluntarily surrendered all claims to his former position by apply-

ing for and accepting retirement benefits and that petitioner's retirement was not the result of coercion or deception on the part of his former employer. Accordingly, the Claims Court granted summary judgment in favor of the government. Pet. App. 29-33.[2]

d. The Federal Circuit affirmed in an unpublished opinion (Pet. App. 1-4). The court held that *Brown* and *Kestner* v. *Department of the Interior*, 229 Ct. Cl. 772 (1982), firmly established the rule that "where an employee has accepted retirement he is precluded from seeking reinstatement and back pay" (Pet. App. 3, quoting *Brown*, 2 Cl. Ct. at 587). The court added that the "mere fact that none of [petitioner's] options were to his liking is irrelevant. *Taylor* v. *United States*, 591 F.2d 688, 690-691 (Ct. Cl. 1979)." In examining petitioner's contention that his retirement was involuntary, the court concluded that there was "absolutely no evidence that [petitioner] was coerced into retirement or misled as to the effect retirement would have on his rights" (Pet. App. 3). The court therefore found that petitioner's voluntary retirement "deprived the Claims Court of jurisdiction" (Pet. App. 4).

2. The decision of the court of appeals is correct, presents no conflict among the circuits, and raises no significant legal issue. Accordingly, review by this Court is not warranted.

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[2] The Claims Court noted that the government had raised "the issue of the effect of [petitioner's] application for retirement benefits upon his right to challenge the propriety of his separation from Government Service" for the first time 12 years after petitioner complained about the events that occurred in 1972. While concerned about this delay, the court held that "the Government is not estopped from raising" the argument. Pet. App. 29.

a. The ultimate disposition of this case is in line with settled law. In *Taylor*, the Court of Claims addressed the question whether an employee "who retires after his removal from the service but while his appeal from such adverse action is pending, is entitled to back pay and reinstatement if the removal action is cancelled by an administrative appellate decision" (591 F.2d at 689). The court held that an employee who voluntarily retires is not entitled to reinstatement or back pay. Rather, the "clear import of the statutes, regulations and decisional law is that a voluntary retirement, like a resignation, results in the employee's complete separation from the Federal service" (*id.* at 690). Under the applicable regulations, the administrative agency lacks "jurisdiction to act on his claim for reinstatement and back pay" if a "plaintiff's retirement was voluntary" (591 F.2d at 693). 5 C.F.R. 752.401(c)(3).

The court in *Taylor* specifically rejected a number of claims that are relevant here. First, quoting applicable personnel regulations, the court stated that "[t]he fact that the employee may be faced with an inherently unpleasant situation, or that his choice may be limited to two unpleasant alternatives, does not make the resulting action an involuntary action" (591 F.2d at 691). Second, the court rejected the plaintiff's argument that "his retirement was involuntary because he understood that it would have no effect on his rights to reinstatement and back pay and that he was not warned that these rights would be lost if he retired before the appeal was decided" (*id.* at 692). An agency has no duty to warn of such consequences, the court stated, adding that it could not deceive or mislead an employee concerning the consequences of retirement (*ibid.*).

As the courts below concluded, petitioner's claim is governed by *Taylor*, *Kestner*, and *Brown*.[3] He was faced with options he found unpleasant, including an offer of another position as an aerospace engineer, and he chose to retire. While petitioner may not have understood that he could not then pursue an appeal, his misunderstanding did not result from any deception by NASA. Therefore, the courts below correctly held that petitioner may not seek reinstatment and back pay.[4]

b. Contrary to petitioner's argument (Pet. 30-31), there is no conflict between the decision in this case and the decision of the Fifth Circuit in *Gonzalez* v. *Department of Transportation*, 701 F.2d 36 (1983). The Fifth Circuit recognized that a plaintiff like petitioner who voluntarily resigned and applied for retirement benefits lost his right to appeal (*id.* at 39). The court's decision appears to illustrate the exception to the general rule occasioned by affirmatively misleading statements by an agency. The plaintiff in *Gonzalez* received a reduction-in-force notice informing her that she was being separated from her agency. The notice stated that she had the right to

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[3] The Federal Circuit recently reaffirmed the rule that an employee who voluntarily retires may not seek back pay. *Sammt* v. *United States*, Nos. 85-2061 & 85-2130 (Dec. 17, 1985).

[4] The fact that petitioner was permitted to receive retirement benefits at age 49 does not establish that his decision was involuntary, as petitioner contends (Pet. 46-48). A retirement may be involuntary for purposes of establishing eligibility for a discontinued service annuity even though the same retirement may be voluntary for purposes of determining whether a plaintiff may pursue an appeal. See *Covington* v. *Department of Health & Human Services*, 750 F.2d 937, 940 (Fed. Cir. 1984).

appeal, that she could be involuntarily separated or resign, and that she could apply for retirement benefits; nothing in the notice informed the plaintiff that she would lose her right to appeal by voluntarily resigning (*id.* at 38). As the Fifth Circuit observed (*id.* at 39), "the notice * * * as a whole indicated that she could *both* appeal and also *either* resign *or* accept involuntary separation and still receive retirement pay." In those circumstances, the court remanded for further proceedings to determine whether plaintiff's separation was a voluntary one. Here, by contrast, the court of appeals found that there was "absolutely no evidence that [petitioner] was coerced into retirement or misled as to the effect retirement would have on his rights" (Pet. App. 3).[5]

In any event, any arguable inconsistency between the Federal Circuit and the Fifth Circuit is of no continuing importance. Congress provided in 1982 that decisions of the Merit Systems Protection Board, with certain inapplicable exceptions, are reviewable only in the Federal Circuit. 5 U.S.C. 7703(b)(1). Therefore, cases like this one will not be reviewed in the regional courts of appeals in the future.[6]

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[5] *Gonzalez* is factually distinguishable as well. The plaintiff in *Gonzalez* was faced with a choice between a voluntary resignation and an involuntary retirement. Petitioner, in contrast, had the option of taking the aerospace engineer position that he was offered. Thus, it is clear that petitioner had a choice of options quite different than those afforded the plaintiff in *Gonzalez*.

[6] There does not appear to be any conflict between the Federal Circuit's decision in this case and other Federal Circuit decisions, as petitioner contends (Pet. 42-46). Relying on *Scharf* v. *Department of the Air Force*, 710 F.2d 1572 (Fed. Cir. 1983), and *Cov[illegible]* v. *Department of Health & Human Services*, 750 F.2d 93[illegible] (Fed. Cir. 1984), petitioner argues that

c. The remaining issue is whether the courts below properly permitted the government belatedly to raise the argument that petitioner was barred from appealing because he chose to retire. Although it is unfortunate that such a basic defect in petitioner's claim was not noticed promptly, the Claims Court correctly concluded, in light of its review of the long history of this case, that the government was not estopped from raising the argument. That fact-bound determination does not warrant review by this Court.

In addition, the Federal Circuit noted that the effect of petitioner's voluntary retirement was to deprive it of jurisdiction. An employee has a right, under 5 U.S.C. 7513(d), to appeal to the Merit Systems Protection Board challenging certain actions listed in 5 U.S.C. 7512. Voluntary actions are not subject to challenge, however. 5 C.F.R. 752.401(c)(3). The courts have frequently described the effect of a determination that a plaintiff voluntarily retired as depriving the administrative tribunal of jurisdiction, since a plaintiff has no right to challenge his

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he should have been advised that he would lose his right to appeal by accepting his annuity. In *Scharf*, the court did not decide whether there was any duty to counsel an employee about his options. 710 F.2d at 1575 n.3. In *Covington*, the court based its decision on the fact that the agency involved had provided "misleading and erroneous" information to the plaintiff. 750 F.2d at 942. While the court spoke of a right of employees to understand their choices (*id.* at 943), that right was violated by the agency by affirmatively misleading the plaintiff in *Covington*, an exception to the general rule recognized in *Taylor*, *Kestner*, and *Brown*, and not applicable here. See 750 F.2d at 943 ("[i]n this case, the agency was responsible for Covington's lack of an informed choice"). Of course, any conflict in the decisions of the Federal Circuit might warrant rehearing en banc by that court, but does not call for review by this Court.

own voluntary decision. See, *e.g.*, *Sammt* v. *United States*, Nos. 85-2061 & 85-2139 (Fed. Cir. Dec. 17, 1985), slip op. 5 (a decision to retire, when the plaintiff's option was to be involuntarily retired, nevertheless "deprives the Claims Court of jurisdiction"); *Taylor*, 591 F.2d at 693; *Kestner*, 229 Ct. Cl. at 774; see also *Burgess* v. *Merit Systems Protection Board*, 758 F.2d 641, 643 (Fed. Cir. 1985) ("the issue of jurisdiction is intertwined with the merits of an action"). It is, of course, long-settled that a claim of lack of subject matter jurisdiction may be raised at any time and may not be waived. *Insurance Corp.* v. *Compagnie des Bauxite de Guinee*, 456 U.S. 694, 702 (1982); *Mansfield, C. & L. M. Ry.* v. *Swan*, 111 U.S. 379 (1884).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1985

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